

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915

No. 378 80

UNION NAVAL STORES COMPANY, PLAINTIFF IN ERROR,

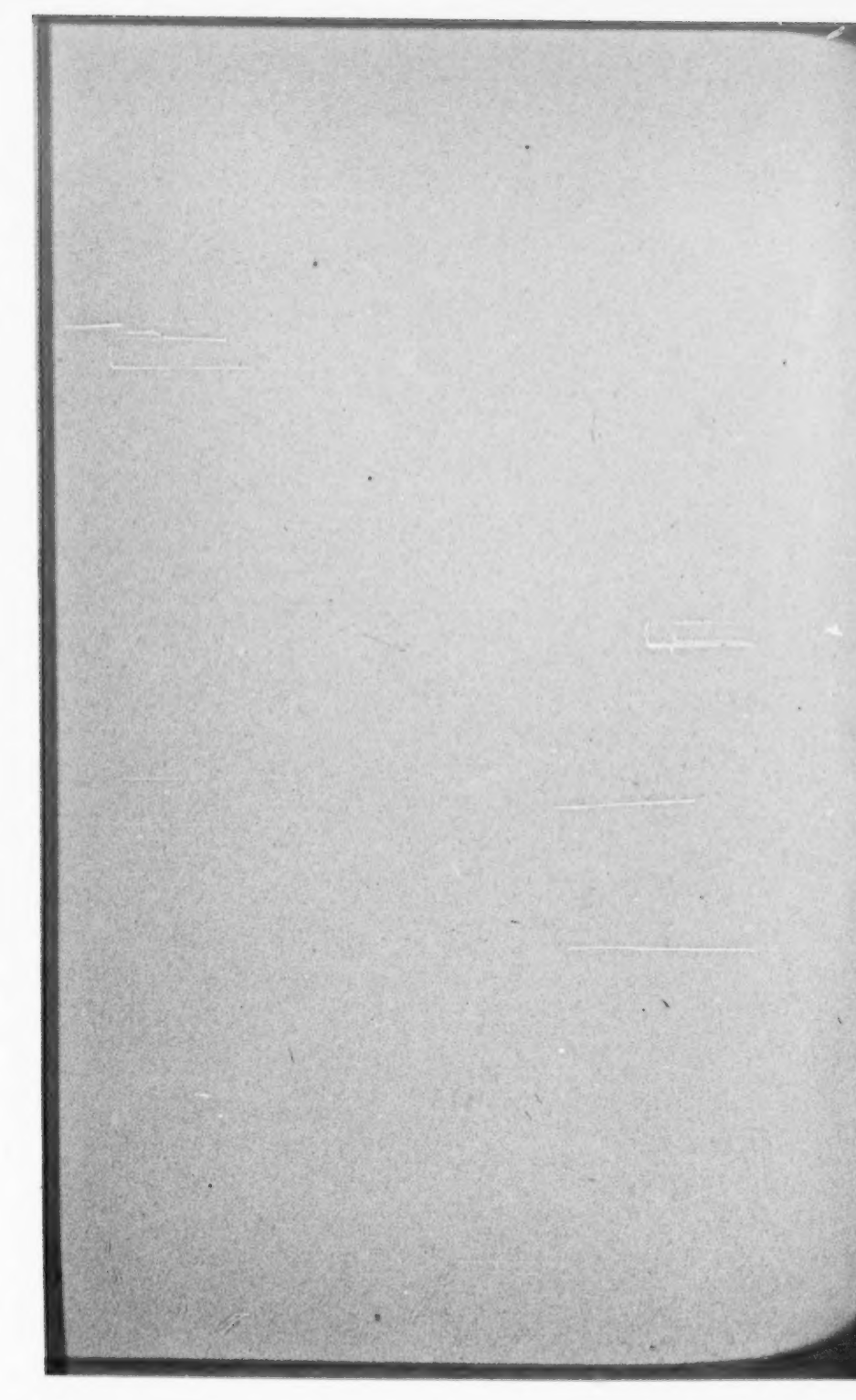
vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

FILED FEBRUARY 27, 1914.

(24,075)



(24,075)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 377.

UNION NAVAL STORES COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

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UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, Begun on Thursday, November 21st, A. D. 1912, at New Orleans, Louisiana, Before the Honorable Don A. Pardee and the Honorable David D. Shelby, Circuit Judges, and the Honorable William I. Grubb, District Judge.

UNION NAVAL STORES COMPANY, a Corporation, Plaintiff in Error,
versus
THE UNITED STATES OF AMERICA, Defendant in Error.

Be it remembered, that heretofore, to-wit, on the 15th day of August, A. D. 1912, a transcript of the record of the above-styled cause, pursuant to a writ of error to the District Court of the United States for the Southern District of Alabama, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2415, as follows:

TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Fifth Circuit.

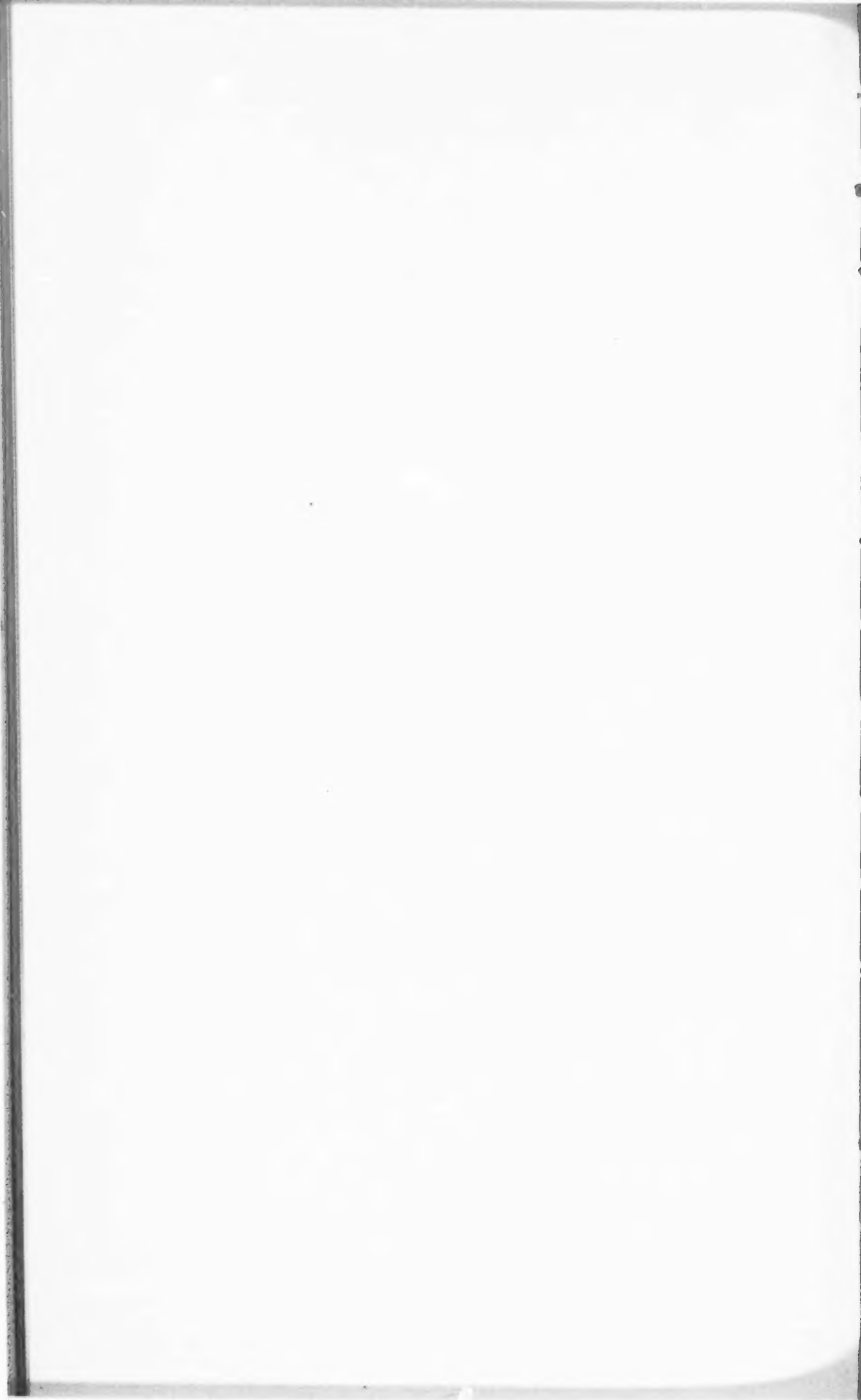
No. 2415.

UNION NAVAL STORES COMPANY, a Corporation, Plaintiff in Error,
versus
THE UNITED STATES OF AMERICA, Defendant in Error.

Error to the District Court of the United States for the Southern
District of Alabama.

U. S. Circuit Court of Appeals. Filed Aug. 15, 1912. Frank H. Mortimer, clerk.

(a)



CAPTION.

UNITED STATES OF AMERICA, DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

Transcript of the record and proceedings had in said court in
Common Law Case Number 1336.

THE UNITED STATES OF AMERICA, Plaintiffs,
versus

UNION NAVAL STORES COMPANY, A CORPORATION
UNDER THE LAWS OF WEST VIRGINIA, Defendant.

Under writ of error sued out by said Union Naval Stores
Company, defendant, from a judgment rendered in favor of
said plaintiffs, as follows:

SUMMONS AND COMPLAINT.

United States of America,

Circuit Court of the United States for the Southern District of
Alabama, Southern Division.

United States of America,

vs.

At Law. No. 1336.

Union Naval Stores Company, a Corporation.

The United States of America, by William H. Armbrecht,
their attorney for the Southern District of Alabama, acting
herein under and by virtue of the direction of the Attorney
General of the United States, and under his authority, bring
this, their complaint against the Union Naval Stores Company,
a corporation under the laws of the State of West Virginia,
doing business at Mobile, in the county of Mobile, in said
Southern Division of the Southern District of Alabama, and
complain and say:

1. Plaintiffs claim of the defendant five thousand nine
hundred and ninety-nine dollars (\$5,999.00) for the conversion
by it during the years 1904 and 1905 of the following chattels
belonging to the plaintiffs, to-wit: Twenty-two hundred and
fifty (2250) gallons of spirits of turpentine and two hundred
and twenty-five (225) barrels of resin taken from the south-
east quarter of southeast quarter, the south half of fraction B,
Section 29, the southwest quarter of southwest quarter of Sec-

tion 28, and the northwest quarter of northwest quarter of Section 33, Township five south of range four west, in the county of Mobile, State of Alabama, which land was then and there known as the Louis I. Freeland homestead, belonging to the plaintiffs, with interest thereon from the date of said conversion.

2. And for that on the first day of January, 1904, and on divers days and times between the said first day of January, 1904, and the first day of January, 1905, in said division of said district, plaintiffs were lawfully possessed as of their own property with certain goods and chattels, to-wit: Twenty-two hundred and fifty (2250) gallons of turpentine and two hundred and twenty-five (225) barrels of resin which had theretofore been obtained from the land described in the first count of this complaint; and being so possessed thereof the plaintiffs afterwards, to-wit, on the same day, there casually lost the said goods and chattels out of their possession, and the same afterwards, on to-wit, the same came into the possession of the defendant by finding, yet the said defendant well knowing the said goods and chattels to be the property of plaintiffs, have not as yet delivered the same, or any part thereof, to the plaintiffs, although often requested, and afterwards, to-wit, on the same day, they then and there converted and mingled the same with other turpentine and resin of the defendant and thereby confused the same, and that the market value of the said turpentine and resin was at the date of said conversion and has been at various times between the date of said conversion and the date of the filing of this complaint, as follows, to-wit: On resin eight (\$8.00) dollars per barrel, and on turpentine one (\$1.00) dollar per gallon.

Wherefore, plaintiff sues and demands judgment for the value of said turpentine and resin as aforesaid, with interest thereon to the date of the trial, in the sum of five thousand nine hundred and ninety-nine dollars (\$5,999.00).

Wm. H. Ambrecht,

United States Attorney.

Filed January 10th, 1910.

Richard Jones, Clerk.

United States of America.

Circuit Court of the United States for the Southern District of
Alabama, Southern Division.

The President of the United States of America to the Marshal
of said District or any of his Deputies—Greeting:

You are hereby commanded to summon Union Naval Stores
Company, a corporation under the laws of the State of West
Virginia, and doing business in the State of Alabama and this
District and Division, to appear before this honorable court
at the November, 1909, term thereof to be held in the city of
Mobile on the first Monday, the 7th day of February, A. D.
1910, then and there to answer unto the complaint filed herein
by The United States of America. And have you then and
there this writ, with your return according to law.

Witness: Honorable Melville W. Fuller, Chief Justice of
the United States, and seal of said Circuit Court this the 10th
day of January, A. D. 1910.

(Seal.)

Richard Jones, Clerk.

Received in office January 10, 1910, and executed by serv-
ing a copy hereof on E. C. Hughes as secretary of the Union
Naval Stores Company this January 11, 1910.

G. B. Deans,

U. S. Marshal.

Returned and filed January 11, 1910.

Richard Jones, Clerk.

TRIAL OF CASE AND JUDGMENT FOR THE UNITED
STATES, PLAINTIFFS, IN THE UNITED STATES
CIRCUIT COURT AT MOBILE.

Friday, December 15th, A. D. 1911. Present Honorable Harry
T. Toulmin, Judge presiding.

United States of America,

vs.

At Law. No. 1336.

Union Naval Stores Company.

This day come the plaintiffs, The United States of America,
by their attorney, W. H. Armbrecht, District Attorney, and
also comes the defendant, Union Naval Stores Company, by
its attorneys, and to try the issue joined comes a jury of good

and lawful men, to-wit: W. G. Austin and eleven others, who, being duly elected, tried and sworn, the trial of the case is proceeded with.

Saturday, December 16th, A. D. 1911. Present Honorable Harry T. Toulmin, Judge presiding.

United States of America,
vs. At Law. No. 1336.
Union Naval Stores Company.

The trial of this case is proceeded with.

Monday, December 18th, A. D. 1911. Present Honorable Harry T. Toulmin, Judge presiding.

United States of America,
vs. At Law. No. 1336.
Union Naval Stores Company.

The trial of this case is proceeded with.

Tuesday, December 19th, A. D. 1911. Present Honorable Harry T. Toulmin, Judge presiding.

United States of America,
vs. At Law. No. 1336.
Union Naval Stores Company.

The trial of this case is now concluded, the arguments of attorneys pro and con made to the jury and the jury charged by the court and the case submitted to them.

And now comes the jury and upon their oaths do say: "We, the jury, find the defendant guilty and assess the damages at \$2,447.55. December 19, 1911. W. G. Austin, foreman."

It is, therefore, considered, ordered and adjudged by the court that the plaintiff, The United States of America, do have and recover of and from the defendant, Union Naval Stores Company, a corporation, the sum of two thousand four hundred and forty-seven and 55-100 dollars (\$2,447.55), together with the costs of this cause, as taxed, for which execution may be issued.

BILL OF EXCEPTIONS.

United States, Plaintiffs,

vs.

At Law. No. 1336.

Union Naval Stores Company, Defendant.

In the District Court of the United States for the Southern
District of Alabama at Mobile.

Be it remembered, that this cause coming on to be heard on December 15th, to December 19th, both inclusive, the same being regular days of the regular November term of the Circuit Court of the United States for the Southern District of Alabama, before the presiding Judge, the Honorable Harry T. Toulmin, and a jury of twelve men, to-wit: W. G. Austin and eleven others, upon the complaint and the plea of general issue thereto, the following proceedings were had:

Th plaintiff offered in evidence the following papers:

Department of the Interior
General Land Office

Washington, May 8, 1911.

I hereby certify that the annexed copies, pages 1 to 13, are true and literal exemplifications from the original papers in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

H. W. Sanford,

(Seal.)

Recorder of the General Land Office.

Page 1.

Department of the Interior
United States Land Office

Montgomery, Ala., April 22, 1905.

The Commissioner of the General Land Office, Washington,
D. C.

Sir:

In compliance with instructions contained in letter "C" of April 4, 1905, we have the honor to enclose herewith, Homestead application No. 34968, made on August 7, 1902, by Lewis

I. Freeland, and amended to read for the Sw 1-4 of the Sw 1-4 of Section 28, S 1-2 of lot No. 3, S 1-2 of lot No. 4, Section 29, and the Nw 1-4 of the Nw 1-4 of Section 33, Tp. 5 south of range 4 west of the St. Stephens meridian, Alabama.

Very respectfully,

Robert Barber, Register.

1-W.

Page 2.

U. S. General Land Office, received April 27, 1905.

70000

United States Land Office

Montgomery, Ala., April 22, 1905.

Register transmits amended application in H. E. No. 34, 948, of Lewis I. Freeland, involving the of Sec
Tp , R.

(C) (R. A. S.)

Reference is had to letter..... of
April 4, 1905.

....., 190.....

C 2-W 144.

Page 3.

Department of the Interior
General Land Office,

Washington, D. C., March 7, 1905.

Subject: Supplemental Plat.

Chief of Division "C," General Land Office.

Sir:—In compliance with request contained in your letter dated February 23, 1905, a supplemental plat of lot 3 and S. 1-2 lot 4, section 29, T. 5 S., R. 4 W., St. Stephens meridian, Alabama, has been complied with the proper officials.

Very respectfully,

C. L. DuBois,
Chief of Division "E."

3-W.

Page 4.

Department of the Interior
United States Land Office

Montgomery, Alabama, February 14, 1905.

The Commissioner of the General Land Office, Washington,
D. C.

Sir:

In compliance with instructions contained in letter "C," of February 7, 1905, we have the honor to enclose herewith tracing of plat Section 29, Tp. 5 S., of R. 4 West, from which entry of Lewis I. Freeland, No. 34,948, for the Se 1-4 of Se 1-4, and S. 1-2 of lot No. 3, of Section 29, Sw. 1-4 of Sw. 1-4 of Section 28, and the Nw. 1-4 of the Nw. 1-4 of Section 33, was allowed, appearing to have been an error as to designation as fraction "B."

Very respectfully,

Robert Barber, Register.

4-W

Page 5.

U. S. General Land Office, received Feb. 17, 1905.

Filed with H. E. 34948.

R. A. S.

30758

(P)

United States Land Office

Montgomery, Ala., Feb. 14, 1905.

Register transmits tracing of plat Section 29, Tp. 5 S., of R 4 West, in H. E. No. 34948, of Lewis I Freeland, involving the

Lo. R. P. B. April 4, 1905.

Tp., R. R. A. S.

(C) (R. A. S.)

Reference is had to letter.... of

February 7, 1905.

Letter "E," Feb. 23, 1905.

A. S. R.

"C" 5-W,

144

P. O. Grand Bay, Ala.

(4-139)

Homestead—Act of May 20, 1862.

(Revised Statutes of the United States, Section 2357.)

Excess.

Receiver's Receipt,

No. 26989.

Receiver's Office,

August 7th, 1902.

Received of Lewis I. Freeland the sum of thirty-three dollars and seventy-five cents, being in full for 27 acres and hundredths of Se. 1-4, Se. 1-4 and S. 1-2, Fraction B, Sec. 29, and Sw. 1-4 of Sw. 1-4, Sec. 28, and Nw. 1-4 of Nw. 1-4 Section No. 33, in Township No. 5, south of range No. 4 west, being excess in said tract over the area entered under the Homestead Act, per application and receipt No. 34,948.

Nathan H. Alexander,

Receiver.

\$33.75.

6-W.

No. 26989.

Excess Receipt.

Land Office at
Montgomery, Ala.

August 7, 1902.

Homestead Application No. 34948.

7-W

P. O. Grand Bay, Ala.

Receiver's Receipt, No. 34948 Application, No. 34948.

Homestead.

Receiver's Office,

August 7th, 1902.

Received of Lewis I. Freeland the sum of fourteen dollars
..... cents; being the amount of fee and compensation of

Register and Receiver for the entry of Se. 1-4, Se. 1-4, and S. 1-2 Fraction B, Section 29, and the Sw. 1-4 of the Sw. 1-4, Section 28, and the Nw. 1-4 of the Nw. 1-4 of Section 33, in Township 5, south of range 4 west, under Section No. 2290, Revised Statutes of the United States.

Nathan H. Alexander,

\$14.00.

Receiver.

Containing 187.00 acres.

Note.—It is required of the homestead settler that he shall reside upon and cultivate the land embraced in his homestead entry for a period of five years from the time of filing the affidavit, being also the date of entry. An abandonment of the land for more than six months works a forfeiture of the claim. Further, within two years from the expiration of the said five years he must file proof of his actual settlement and cultivation, failing to do which, his entry will be canceled. If the settler does not wish to remain five years on his tract, he can, at any time after fourteen months, pay for it with cash or land warrants, upon making proof of settlement and of residence and cultivation from date of filing affidavit to the time of payment.

See note in red ink, which Registers and Receivers will read and EXPLAIN THOROUGHLY to person making application for lands where the affidavit is made before either of them.

Timber land embraced in a homestead, or other entry not consummated, may be cleared in order to cultivate the land and improve the premises, **but for no other purpose.**

If after clearing the land for cultivation, there remains more timber than is required for improvement, there is no objection to the settler disposing of the same. But the question whether the land is being cleared of its timber **for legitimate purposes** is a question of fact which is liable to be raised at any time. If the timber is cut and removed **for any other purpose** it will subject the entry to cancellation, and the person who cut it will be **liable to civil suit** for recovery of the value of said timber, **and also to criminal prosecution** under Section 2461 of the Revised Statutes.

Excess Receipt No. 26989.

8-W.

Homestead Affidavit.

U. S. Land Office at Montgomery, Ala.,

Mobile, July 29th, 1902.

I, Lewis I. Freeland, of Grand Bay, Ala., having filed my application No. 34948, for an entry under section 2289, Revised Statutes of the United States, do solemnly swear that I am not the proprietor of more than one hundred and sixty acres of land in any State or Territory; that I am* a native born citizen of the United States, over 21 years of age and residing more than fifty miles from the land office of this district; that my said application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation, and that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that I am not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that I do not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation, or syndicate whatsoever, by which the title which I might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except myself, and further, that since August 30, 1890, I have not entered under the land laws of the United States, or filed upon, a quantity of land, agricultural in character, and not mineral, which, with the tracts now applied for, would make more than three hundred and twenty acres, except and that I have not heretofore made any entry under the homestead laws, except

(Sign plainly with full christian name)

his
 Lewis I. (X) Freeland.
 mark.

Sworn to and subscribed before me this 29th day of July, 1902, at my office at Mobile, in Mobile county, Alabama.

Elliott G. Rickarby.

* Here insert statement that affiant is a citizen of the United States, or that he has filed his declaration of intention to become such, and that he is the head of a family, or is over twenty-one years of age, as the case may be. It should be stated whether applicant is **native-born** or not, and if not, a certified copy of his certificate of naturalization, or declaration of intention, as the case may be, must be furnished. See page 45, circular of January 1, 1889.

9-W.

Page 10.

Non-Saline Affidavit

Land Office at Montgomery, Ala.,

Mobile, Ala., July 29th, 1902.

Lewis I. Freeland, of Mobile county, being duly sworn according to law, deposes and says that he is the identical person who is an applicant for government title to the S. 1-2 of Se. 1-4, Sec. 29, Sw. 1-4 of Sw. 1-4, Sec. 28, and Nw. 1-4 of Nw. 1-4, Sec. 33, and Township 5, south of range 4 west, that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same, that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto, that there is not, to his knowledge, within the limits thereof, any salt spring, or deposit of salt in any form, such as to make it chiefly valuable on account thereof, that no portion of said land is claimed for saline purposes, that said land is essentially non-saline land, and that his application, therefore, is not made for the purpose of fraudulently obtaining title to saline land, but with the object of securing said land for agricultural purposes, and that his post office address is Grand Bay, Mobile county, Alabama.

his

Lewis I. (X) Freeland.

mark

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto, that

said affiant is to me personally known, and that I verily believe him to be a credible person, and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in Mobile, Ala., within the Montgomery, Ala., Land District, on this the twenty-ninth day of July, 1902.

(Seal.) Elliott G. Rickarby,
U. S. Commission So. Dist. Ala.

10-W.

Page 11.

Duplicate.

Amended letter "C," April 4, 1905, to read for Sw. 1-4 of Sw. 1-4, Section 28, S. 1-2 lot No. 3, S. 1-2 of lot No. 4, Section 29, Nw. 1-4 of Nw. 1-4 of Section 33, Tp. 5, S. of R. 4 west, containing 185.34 acres.

Robert Barber.

P. O. Grand Bay, Ala.

Receiver's Receipt No. 34948.

Application No. 34948

Homestead.

Receiver's Office

August 7th, 1902.

Received of Lewis I. Freeland the sum of fourteen dollars cents; being the amount of fee and compensation of Register and Receiver for the entry of Se. 1-4, Se. 1-4, and S. 1-2, Fraction B, Section 29, and the Sw. 1-4 of the Sw. 1-4, Section 28, and the Nw. 1-4 of the Nw. 1-4 of Section 33, in Township 5, south of range 4 west, under Section No. 2290, Revised Statutes of the United States.

Nathan H. Alexander,

\$14.00.

Receiver.

Containing 187.00 acres.

Note.—It is required of the homestead settler that he shall reside upon and cultivate the land embraced in his homestead entry for a period of five years from the time of filing the affidavit, being also the date of entry. An abandonment of the land for more than six months works a forfeiture of the claim. Further, within two years from the expiration of the said five

years he must file proof of his actual settlement and cultivation, failing to do which, his entry will be canceled. If the settler does not wish to remain five years on his tract, he can, at any time after fourteen months, pay for it with cash or land warrants, upon making proof of settlement and of residence and cultivation from date of filing affidavit to the time of payment.

See note in red ink, which Registers and Receivers will read and EXPLAIN THOROUGHLY to person making application for lands where the affidavit is made before either of them.

Timber land embraced in a homestead, or other entry not consummated, may be cleared in order to cultivate the land and improve the premises, **but for no other purpose.**

If, after clearing the land for cultivation, there remains more timber than is required for improvements, there is no objection to the settler disposing of the same. But the question whether the land is being cleared of its timber **for legitimate purpose** is a question **of fact** which is liable to be raised at any time. If the timber is cut and removed **for any other purpose** it will subject the entry to cancellation, and the person who cut it will be **liable to civil suit** for recovery of the value of said timber, **and also to criminal prosecution** under Section 2461 of the Revised Statutes.

Received \$33.75 excess on 27 acres.

Excess Receipt No. 26989.

11-W

Page 12.

Grand Bay, Ala., Oct. 2, 1907.

I hereby relinquish to the United States all my right, title and claim in and to the lands described in this receipt.

his
Lewis I. Freeland (X)
mark.

Acknowledged before me this 2nd day of Oct, 1907.

Fred Hoisington,
Special Agt. G. L. O.

Received in the United States Land Office at Montgomery, Ala., October 4, 1907, at 9 a. m., and noted on records as cancelled by relinquishment.

Robert D. Johnston, Register.

Lewis I. Freeland, H. E. 34948.

12-W.

Page 13.

Application No. 34948.

Land Office at Montgomery, Ala.

Mobile, Ala., July 29th, 1902.

I, Lewis I. Freeland, of Grand Bay, Mobile county, Alabama, do hereby apply to enter, under Section 2289, Revised Statutes of the United States, the (Se. 1-4 of Se. 1-4, Sec. 29), (S. 1-2 of Fraction "B," 29), Sw. 1-4 of Sw. 1-4, Sec. 28 and Nw. 1-4 of Nw. 1-4 of Sec. 33, in Township five, south of range four west, containing 187.00 acres.

Homestead.

Montgomery, Ala., April 6, 1905.

Amended letter "C," April 4, 1905, to read for Sw. 1-4 of Sw. 1-4 of Section 28, S. 1-2 of lot No. 3, S. 1-2 of lot No. 4, of Section 29, and the Nw. 1-4 of Nw. 1-4 of Section 3, Tp. 5, S. of R. 4 west, containing 185.34 acres.

his

Lewis I. (X) Freeland.

mark.

Witness to mark:

Elliott G. Rickarby.

Excess Receipt No. 26989.

Land Office at Montgomery, Ala.

August 7th, 1902.

I, Robert Barber, Register of the Land Office, do hereby certify that the above application is for Surveyed Lands of the class which the applicant is legally entitled to enter under Section 2289, Revised Statutes of the United States, and that there is no prior valid adverse right to the same.

Robert Barber, Register.

United States Land Office at Montgomery, Ala.,

April 21, 1905.

I, Robert Barber, Register of the Land Office, do hereby certify that the above application is for Surveyed Lands of the class which the applicant is legally entitled to amend to under Section 2289, Revised Statutes of the United States, and that there is no prior valid adverse right to the same.

Robert Barber, Register.

13-W

The defendant objected to the introduction of said page twelve designated as relinquishment on the ground that there was no evidence of its execution before the court, and upon the further ground that it was not signed by the same party whose name appears in the complaint to be the homesteader. The one instrument being Lewis Freeland and the other "Louis." The court overruled the objection and the defendant excepted to said ruling.

The plaintiff introduced the witness Lewis L. Freeland, who testified as follows:

"My name is Lewis Freeland. My initials are L. L. I am the Lewis L. Freeland who made a homestead entry for some lands in Sections 28, 29 and 33, in Township 5 S., Range 4. W. I never made but one homestead entry. I never gave anybody a turpentine lease on the land covered by my entry. Part of that land was boxed for turpentine in 1903. I recollect the big storm, and it had been used one year before the storm and they were tending to it near the storm. It was worked the year of the storm and one year before that. That year it was worked by old man Henry Rayford."

Being asked: "Did you give him any authority to work it for turpentine?" the witness answered: "No, sir. I will tell you exactly. He leased what land I had there. I had timber on both sides of it. Joe Walters made that agreement for that timber. I found out he had my homestead and I went there and showed him what I owned. I told him if I leased my homestead I would cancel it I was told, and I would lose it then. I said I have you cheek here right now, I have not used it. I said if you cut on the homestead part you cut it at your own risk. The other part was all right." I don't know how many boxes he cut on my homestead. He said there was no law

against turpentine. I did see them chipping it—working it from time to time when Mr. Rayford worked it. The timber was chipped and the turpentine dipped. I saw the crude gum in the woods, but didn't see where it was carried. I have seen it on a wagon but don't know where the wagon went. The wagon would go back that way towards Mr. Rayford's still. I have been around Rayford's still when it was being worked. They did the same at that still as at any other still. They had a platform there that they rolled the crude out on. I guess they put the crude in a tank. When I was at the still they were operating it. I don't know anything about the operations, but they were making spirits at the still. The barrels were set on the platform. Sometime the still was running and sometimes not. I never saw them empty any crude into the tank. I saw it on the platform and can't say where it came from. I don't know where the wagons came from with the gum. In the turpentine business they have a crop here and another there, and they may come through each piece. I don't know about gum coming from this homestead. I have seen them chipping the trees on this homestead. I have seen barrels sitting up on the homestead when I was passing through. I have seen barrels going out of there. The wagons with the barrels were going back towards Grand Bay—that is a little southeast towards the stills. There are two or three stills down that way and Rayford's still was the closest. I have seen those same wagons at Rayford's still. I have never followed any particular wagon load out of that part of the woods. The man doing the chipping there was named Richard Hubbard. They had several drivers driving the teams. One of them was an old black fellow and I have forgotten his name."

On cross-examination the witness testified that the men he saw working in the woods were gathering crude gum.

"I saw wagons go out there and load up the stuff and move off in the direction I have stated, but didn't follow them and don't know where they went. I don't know that there were any other turpentine wagons out there in that part of the woods. These same wagons didn't haul for other stills in the neighborhood. The other stills mentioned have wagons. But I never saw any of the other wagons right around my place in there. I never saw them go across that land, and don't know that I ever saw them on the roads going past there. I have

seen these particular wagons pass back and forth many times without stopping to get anything off this land. I can't say how many times I have seen them stop and get stuff off this land. They didn't pass over the turpentine lands like that more than once a month, if they did that. I never saw them dump any turpentine from the still platform into the still. Whenever I would go to the still the whole platform was covered with barrels. I don't know whether the stuff on the platform came from my homestead or not. Mr. Rayford had a lot of other turpentine boxes around my neighborhood. I think he had thirteen crops, each containing 10,500 boxes. These thirteen crops I speak of were on other lands than my homestead. I could not say that any of the turpentine I saw at the still at any time had come from my homestead. I couldn't swear that any of it came from there, nor could I identify any of the barrels. None of the stuff was so marked as to distinguish it from other stuff from other places. It was all in the same kind of barrels. You could not separate the stuff that came from this homestead from other stuff when they were here together on the platform if you tried. The manner of the wagons gathering the stuff in the woods when I saw them was that the woodsmen generally came out with a load of barrels and they put probably four or five barrels for each crop and go on may be three or four miles further to another crop and put barrels there. Whenever there are barrels enough to load a team the team would go around and pick some out of this crop and some out of another. I leased all of my timber to Mr. Rayford for a lump price. I didn't include the homestead. He paid me a lump price for the whole thing. Joe Walters drew up that agreement between me and Mr. Rayford and I heard him include the homestead, and I saw Mr. Rayford and took him a map. I said you see what I own. I said they tell me you included the homestead. I said I am afraid to box that I will lose the land. I had 506 acres besides this homestead that I leased to him. It was all timbered with pine timber, and my turpentine lease to Mr. Rayford covered all that. He paid me a lump sum for the whole business. I offered him the check back and said I am afraid I will lose my land. He says, no there is no law against turpentinizing a piece of homestead land as long as you are on it. Then I kept the check and collected it. I remember that the year of the storm was 1906 in the

month of September. The storm blew down all the timber on that homestead."

On re-direct examination the witness testified that he was present at a survey of that land when it was surveyed by Mr. Holder. "The land so surveyed was my homestead. I couldn't say whether Rayfield's wagons went on this land about once a month. If timber is properly chipped it is dipped about once a month. I was not at home all the time and didn't see them there that often. I didn't see them but once or twice. Mr. Rayford had boxes on other land besides my 506 acres and this homestead. He had boxes all over the country there. I couldn't say how many boxes there were on this homestead. It could not have been a crop because there was a field. I think he had about 13 crops of boxes all together."

Being asked whether there was many boxes to the acre on this land as there was on the other land in those 13 crops, the witness answered: "In leasing turpentine land a turpentine man rides through the woods. Here are 160 acres may be have not anything on it at all. May be there are 80 acres that will come near cutting a crop of 10,500. There are thick and thin places of timber in the woods. May be you strike a flat with no trees on it at all hardly. There was several little gaps in this homestead. There was a good big clearing on the north side of it. Down in section thirty-three there was a big gap cut and cleaned up in there."

The plaintiff introduced the witness Dan F. Britton, who testified he knows the Freeland homestead, but not very well.

Plaintiff's counsel asked this question:

"Do you know the land that is known in the community as the Freeland homestead?"

Defendant's counsel objected because that is not a proper designation of the description of the land. The court overruled the objection and the defendant excepted. The witness answered, "Yes sir."

Witness further testified that that land was boxed for turpentine. It was worked in 1906 and for one year before that. "I was at that time riding the woods for a turpentine company, but not riding those woods. I was riding several miles from it. I went on the road alongside there. I would ride through there once in a while. The timber was fairly good along the

road there. I didn't pay much attention to the boxes, as I was not riding for them. I never compared them with the timber that I rode. I was present when Mr. Buck and Mr. Hoisington made the survey after the storm. I guess that is the land we have been talking about. I could not tell anything about the timber or the land then, for the timber was all down and I could not recognize it."

On cross-examination the witness testified, in answer to the question:

"When you went down there with Surveyors Buck and Hoisington did you go all around the land then?"

Answer. "I suppose so, as well as I knew. I never had been around it before—not all of it. I had been through it on the public road. It was not in my woods at all. I didn't ride those woods."

Witness was asked this question:

"What portion of the place that you went around with the surveyor did the public road go through; corner of it, or what?" Answer. "Well, the corner I suppose. It goes by a little place over there where there is a little shanty built there. There was a shanty built on the land. I don't remember whether there was anybody there or not then. Don't know how many acres we went through. All I know about it is we went there and followed the surveyor. I had not been over all of it before, and at the time we went there with the surveyor it was after the storm and the timber was all blown down."

Plaintiff introduced the witness A. P. Rayford, who testified:

"Henry Rayford, deceased, was my father. My father was engaged in the turpentine business just out from Grand Bay, north of Grand Bay five miles. I was bookkeeper and time keeper for my father. I think we were there in the years 1903, 1904 and 1905. My father operated and obtained turpentine from the Lewis Freeland homestead. I don't know whether it was during 1903 or not. I know it was 1904 and 1905. I don't know approximately how many boxes there were on that homestead. We had over 100,000 boxes all together. I could not say how many acres we operated. We had 20 crops and you generally count 10,500 to a crop. I couldn't say how many boxes we averaged to the acre. I didn't stay in the

woods. I would go out sometimes, but I was not inspector or tally man, or anything like that. I stayed at the commissary most of the time. I don't know where the corners of this land were. I passed through there. The sort of timber on this land was about middling. All the big timber had been previously cut off, and it was nothing but small timber, but it was pretty good turpentine timber. I couldn't say how many boxes to the acre were cut on this land. I don't know the average number of boxes to the acre. I don't recollect how many barrels to the dip we got off this land. I kept a record of it all, but could not say from recollection. I could figure on how much each crop would do. Sometimes those boxes were not worked; may be lost a month's streak, when we would not get anything then. I couldn't say how many streaks it lost in a year. It would be a hard matter to judge how much you get out of each box like that."

Witness testified that he had been engaged in the turpentine business down there for three years; that he knew what size those boxes were. The witness was then asked, "Do you know how these boxes were worked?" He answers, "I couldn't say whether they were worked every week or not." Question, "Generally speaking?" Answer, "Yes." Question, "Do you know the character of timber that was on there?" Answer, "Yes, passed through it, but I don't know whether it was like that all the way through or not." It was all there about like that. I kept a record of the amount of gum that was obtained from time to time from this timber, and all the timber around there. I was out in the woods from time to time and saw the boxes. I would get reports from time to time on every dipping.

Plaintiff asked the witness this question, "From your visits in the woods and what you saw, can you state approximately the number of barrels of crude gum obtained per year from a crop of 10,500 boxes, having reference to this particular land and these particular boxes?"

Defendant objected to the question, because a proper predicate had not been laid for testimony by this witness. The witness answered: "It would be about 30 to 35 barrels to the crop, if there was a crop of boxes on the land."

Witness testifies that he means 35 barrels to the dipping, and that you dip once a month, or sometimes, once every five

weeks, and sometimes, once every six weeks. The witness could not say how many dippings were made during the year 1904. "We might have missed several streaks. I know we were short of labor several times during the summer, and I don't know whether it was those boxes or some other boxes. We got six or eight dippings in the year 1904. I guess it would average about the same in the year 1905 if the boxes were worked properly, that is, if they had a streak every week. I couldn't say how many dippings we made during the year 1905. We made several, and I know we made as many as three. I would be afraid to go as far as saying we made four. The witness was then asked, "Did you work the entire season of 1905, or did you stop in the middle of the season?" He answered, "Of course, we worked, that is, whenever we could get a chipper." An entire season's work is eight months. We worked an entire season whenever we could get hands. If we had the hands, we didn't stop. We didn't give up the business during the middle of the year, but worked the entire season so far as we could get hands. An entire season would make eight dippings, but I couldn't hardly say that we made them, for we had a right smart of trouble getting hands. We worked over half of the time and it would average probably three-fourths of the time. The witness was then asked, "Do you know approximately the number of gallons of turpentine that would be manufactured from a crude barrel of gum of the kind you had there at that time and the size which you had?" A. "Well, we would get three or four barrels to the dipping—well, I don't know how much that would be; I couldn't answer that question." Q. "How many gallons of turpentine would you manufacture, or did you get from a barrel of crude gum?" A. "Ten gallons." Q. "How many net barrels of rosin, 280-pound barrels, would you get from a crude barrel of gum?" A. "Twelve barrels of gum would make about six barrels of rosin, would weigh about 550 pounds, average about that." Q. "From 12 barrels of crude gum you would get 6 barrels of rosin weighing 550 lbs.?" A. "Yes." Q. "What is a net barrel of rosin?" A. "280." Q. "You would not get six barrels of 280, but you would get six barrels weighing 550?" A. "Yes, average along there, 525-550." Q. "The first year do you know what grade that rosin would average, the first year that you worked?" A.

"No, sir, I couldn't say. It is according to how the still ran the charge off." Q. "The way you all ran the charge?" A. "Sometimes make W. W. and W. G., M. and N. We would make about W. G. The first dipping you would not get good grade out of it because it was dirt." The grade of rosin produced from the first season would run from W. W. down to about K. For the second year, it would run common grades E. and F. I was my father's bookkeeper, and besides keeping the books, attended to the store or commissary. The turpentine and rosin my father manufactured was shipped to Mobile to the Union Naval Stores Company. We didn't ship it to anybody else. We rendered bills against the Union Naval Stores Company or sent them a memorandum of rosin and turpentine shipped to them from time to time. It would be in the form of a letter saying, "Enclosed find bill of lading for so many barrels of rosin and so many barrels of spirits shipped this day in car so-and-so." The railroad agent made out the bills of lading. I wrote the letters. I don't know that I remember ever writing to anybody else other than the Union Naval Stores Company during 1904 and 1905 that we shipped them rosin and turpentine. I would remember it if I did, and I am satisfied I did not. It was their general custom to render us an account sales. While I was in that office we didn't receive any account sales from anybody else excepting the Union Naval Stores Company. I don't know whether my father had a contract with the Union Naval Stores Company. The shipping was attended to in this manner: Sometimes some of my father's negroes were sent to load the product, and they would come back and tell me how many barrels were in the car. Sometimes one of us would see if it had a certain amount in there and count it. I did the writing of the letters. I was working for my father and acting on his behalf when I was shipping turpentine. I was keeping the books for my father. Sometimes I went out in the woods in connection with the dipping, etc., when acting for my father. He did business under the name of H. M. Rayford & Company. I don't know who, if anybody, was his partner. I didn't know that was homestead land from which turpentine was being taken. They called all the land down there homesteads. Even if it was proved out they would call it homestead. I didn't see any house on the Freeland homestead. I don't know whether there was a house

on it. After we had worked it for a year or two they said there was no house on it—that he had not lived on it. That is what some of them said. I don't know that Freeland lived on it. I don't know that it had been proved out. I didn't know that it had not been proved out. My father and Freeland were all the time talking about land. I never heard anything said about this being a homestead. It went by the name of Freeland's homestead. That is all I know about it. I do not recollect what turpentine was worth per gallon about that time. To the best of my recollection rosin was worth about \$4.00 per barrel. I think my father came there to operate that business in 1903. He sold out to L. B. Pringle, and I think he turned over the business to Pringle in November, 1905.

On cross-examination witness stated that it was just sometimes that he rode out in the woods where the boxes were situated, but not with regularity. Witness' father is dead. "In going through what I called the Freeland homestead, I merely followed the road through it and I don't know how the road went through it. I didn't have actual or active supervision over the woods operations, nor did I assume any authority with reference to the woods operations. When I went on my trips I went in a buggy. I didn't stay on the Freeland homestead any length of time, but just went along through it without stopping. I could not say whether the boxes on the Freeland homestead were worked steadily or how long they had been worked. When I stated that we get 35 barrels to a dip, I meant 35 barrels to a dip from a crop of 10,500 boxes. I don't know the number of boxes on the Freeland homestead. In keeping our accounts of the product from the various lands, they were not kept separate by tracts of land, but according to crops of boxes. I don't know whether a single crop was entirely on this Freeland homestead or whether it over-lapped. I don't know whether there was a crop, or more or less than a crop on the so-called Freeland homestead. I don't know how many dips per annum were taken from the Freeland land. I don't know the kind or character of timber on the Freeland homestead away from the public road through it. My own knowledge of it is simply derived by seeing it so far as could be seen from the public road. I don't know whether the Freeland homestead was timbered, or whether there was bays or gaps on it. The price I mentioned of \$4.00 per barrel for rosin is for common

grades. The average price would be a little more than that. The majority of the product from my father's turpentine farm was common grade. In the general run of product of a turpentine farm, the greater portion is common grade, after you get two or three dippings. The best turpentine is that first dipped from the trees. When the turpentine was brought in from the woods it was brought in from all parts of the woods where my father had boxes and brought to the still. There was no separation made of the stuff that comes from one crop of boxes from that which came from another crop. There was no means of telling when the stuff came to the still, what stuff came from one tract of land or what came from another. It was mingled at the still on the platform before being manufactured. If it was new dip it was put in a separate place until we got a charge of that. All the common grade went in one place and all the good in another. At the time we started to get the new crop of stuff from the Freeland homestead, or the stuff reported to come from there, we were getting stuff of similar kind from other lands my father had. He had several crops of the same kind of stuff at the same time. We put twelve barrels of crude in the still at a time for a charge. It was all mixed together in the still tank and part of it comes out as rosin and part as spirits. When it comes out you can't distinguish any part coming from one lot of crude from that coming from another lot of crude. There was no attempt made to separate it, and no method of doing it. The Union Naval Stores Company was furnishing money to my father and he had made a mortgage to that Company. I don't know whether they had a shipping contract or not. My father drew drafts against the Union Naval Stores Company and they furnished him financial backing."

On re-direct examination the witness testified that:

"We received monthly statements from the Union Naval Stores Company. I don't know what become of the statements. We left them down there, I suppose they were destroyed. There was a storm there in 1906, but the building in which the statements were kept was not destroyed. The last time I saw them I had them in a big book down at the saw mill about a half mile on the other side of the turpentine place, but the book containing the statements got burned.

Those statements showed the cash that we had gotten every

two weeks and the supplies on one side and a credit for spirits and rosin on the other side. It didn't contain anything about any profits. The business was in debt all the time. To have any aid we had to lease more timber. The business was in debt all the time."

The plaintiff introduced a shipping contract between H. M. Rayford and the Union Naval Stores Company, dated December 21, 1903, as follows:

STATE OF ALABAMA,
Mobile County.

This agreement, made and entered into this the 21st day of December, A. D. 1903, by and between H. M. Rayford, of Mobile county, State of Alabama, as party of the first part, and Union Naval Stores Company, a corporation organized under the laws of West Virginia, as party of the second part, Witnesseth:

That the party of the first part, for and in consideration of the covenants and agreements on the part of the party of the second part hereafter contained, does hereby covenant and agree as follows:

First. That said party of the first part will properly cut and box at least ten crops (of 10500 boxes each) of virgin turpentine boxes this winter; said boxes to be cut upon the pine trees on the lands described in or covered by certain deed of trust of even date herewith, wherein said party of the first part is grantor or mortgagor, and J. W. Wade, trustee, is grantee, which deed of trust was given to secure an indebtedness to said party of the second part, and is hereby referred to and made a part of this contract, and that said party of the first part will diligently and faithfully work said ten crops of virgin boxes, and in addition thereto, said party of the first part will also work during the season of 1904 the following other turpentine boxes, viz.: Five crops of yearling boxes, Four crops of third year boxes, andcrops of fourth year boxes, all for crude turpentine; and that said party of the first part will promptly manufacture said crude turpentine into manufactured turpentine and rosin, using the utmost care and diligence to make the trees on said lands produce the largest possible yield of crude turpentine, and to promptly manufacture therefrom manufactured turpentine and rosin,

Second. Should the party of the first part, for any reason or without reason, be unable or fail or refuse to promptly manufacture said crude turpentine into manufactured turpentine and rosin, then the said party of the first part shall promptly deliver the said crude turpentine to the said party of the second part, at such point or points as the party of the second part may designate; and should the party of the first part fail to promptly deliver the said crude turpentine to the said party of the second part, then the said party of the second part, or its agents, attorneys, or assigns, are hereby authorized and empowered to seize the same, and take the same into possession, wherever it may be found; and the party of the second part may thereupon manufacture the same into manufactured turpentine and rosin, charging the cost of manufacture to the said party of the first part, and may thereupon sell the same, allowing to the party of the first part the best prices party of the second part can obtain, less commissions and charges hereinafter mentioned, to be applied by the party of the second part as hereinafter specified.

Third. That the party of the first part shall promptly deliver to the said party of the second part at Mobile, Ala., or at any other place said party of the second part may select, as soon as manufactured, all of the manufactured turpentine and rosin produced by the said party of the first part, or by any of said party's servants or employees, or by any one else for said party of the first part on said lands, or on any lands which said party of the first part may own, or in which said party of the first part may have a lease-hold interest or other interest, or of which said party of the first part may be in the possession or control, during the continuance of this contract, in the county of Mobile, in the State of Alabama; also all of the manufactured turpentine and rosin which the party of the first part may acquire in any manner during the continuance of this contract; that said party of the first part will promptly manufacture into manufactured turpentine and rosin, all the crude turpentine which the said party of the first part may in any manner acquire during the continuance of this contract, and deliver such manufactured turpentine and rosin to the party of the second part, as herein provided for.

Should the party of the first part fail or refuse to promptly deliver, such manufactured turpentine and rosin, to the party

of the second part as soon as manufactured, then the said party of the second part, or its agents, attorneys, or assigns, are hereby authorized and empowered to seize and take the same into their possession, wherever it may be found, and to sell the same, allowing to the party of the first part, the best prices party of the second part can obtain, less commissions and charges hereinafter mentioned, to be applied at the option of the party of the second part, to the payment of any unsecured indebtedness due by the party of the first part to the party of the second part and then to the satisfaction of the indebtedness secured by the deed of trust hereinbefore mentioned.

Fourth. That during the continuance of this contract, the party of the first part will not deliver crude or manufactured turpentine or rosin produced or manufactured by the party of the first part, or any one for the party of the first part, or which the party of the first part may acquire in any manner, to any person or persons, corporation or corporations, other than the party of the second part.

Fifth. That said party of the first part, during the continuance of this contract, will purchase from the party of the second part as factor, all supplies and merchandise of every kind, character or description, used in producing said crude turpentine and the cutting and boxing of said trees, and in the manufacture of said turpentine and rosin, whether said supplies are for the use of the party of the first part, or the servants, employees, animals, teams or commissary of the party of the first part, and that said party of the first part will buy such supplies and merchandise from no other than said party of the second part, without the consent of the party of the second part, and that said party of the first part will pay the party of the second part therefor the ruling prices.

Sixth. That the party of the first part will pay the party of the second part, for its services in handling and selling said turpentine and rosin, as hereinafter provided.

Seventh. That said party of the first part will not box, cut or work any trees upon any lands of the United States, or upon any homestead lands which have not been fully proven up: nor will said party of the first part purchase or in any manner acquire any crude or manufactured turpentine or rosin taken from any such lands.

Eighth. In the event the party of the first part shall make

default in any of the agreements and stipulations on the part of the party of the first part contained in this contract, the party of the first part agrees to pay to the party of the second part or its assigns, as liquidated and stipulated damages for the failure to comply with this contract, and not as a penalty, the sum of three hundred dollars.

The Party of the Second Part, in its turn, in consideration of the covenants and agreements on the part of the party of the first part herein contained, covenants and agrees as follows:

First. That it will advance to the party of the first part, from time to time, in such amounts and at such times as may be mutually agreed upon, money, not to exceed the sum of sixty-seven hundred and fifty dollars, except at the option of the party of the second part, which the party of the first part agrees expressly to use for the sole and single purpose of working said trees, producing crude turpentine, and manufacturing turpentine and rosin; which advances are secured by notes and deed of trust or mortgage given by the party of the first part of even date herewith, as hereinabove referred to.

Second. To receive such manufactured turpentine and rosin delivered to said party of the second part by the party of the first part at Mobile, Ala., or at any other point designated by the party of the second part, under the provisions of this contract and to sell said turpentine and rosin at best obtainable prices; party of the second part to receive from party of the first part charges and commissions as follows:

For gauging turpentine.....	10 cents per barrel
For classing rosin.....	5 cents per barrel
For weighing rosin	3 cents per barrel
For cooperage of turpentine.....	4 cents per barrel
For cooperage of rosin	3 cents per barrel

For wharfage and storage of turpentine 8 cents per barrel

For wharfage and storage of rosin. 6 cents per barrel

For insurance, 1-2 of one per cent. on the gross value, and 10 per cent. added.

For commission, 2 1-2 per cent. on gross amount of sale.

The party of the first part hereby authorizes the party of the second part to apply the proceeds of all sales of turpentine and rosin, at the option of the party of the second part, to the credit, part payment, or satisfaction, in whole or in part, of

any open account or other indebtedness due by the party of the first part to the party of the second part, or upon the indebtedness secured by the deed of trust or mortgage of even date herewith, hereinbefore referred to.

It is mutually understood and agreed between the parties hereto, that this contract shall be binding and operative and in full force and effect until the first day of April, A. D. 1905, and until the deed of trust or mortgage hereinbefore referred to and made a part of this contract, shall have been fully paid and discharged, and all advances thereunder made by the party of the second part to the party of the first part, are fully repaid.

If the party of the first part be partnership or more than one person, this instrument and each and every part thereof shall be construed as a joint and several obligation upon each member thereof, and the same shall be fully binding and effective against the survivors or successors of them; likewise the property owned or hereafter acquired by said party of the first part as mentioned herein shall be held to embrace the after acquired property of each of them, jointly and severally; likewise the indebtedness secured shall be held to be the indebtedness of each and every one of them jointly and severally.

And the party of the first part, in behalf of himself and family, hereby waives and renounces all rights of exemption, as to realty, personalty, leases, choses in action and every other kind of property as against the obligations of this instrument, and also as against any and all other debts secured by said deed of trust or mortgage, whether evidenced by written instrument or not.

This contract is executed in duplicate.

In witness whereof we have hereunto set our hands and seals this day and year above written.

H. M. Rayford. (Seal.)

Witness:

J. Macmurdo.

Union Naval Stores Company,
By J. W. Wade, President.

The plaintiff here introduced in evidence an original deed of trust from H. M. Rayford to J. W. Wade, trustee, to secure

an indebtedness to the Union Naval Stores Company, dated December 21, 1903, as follows:

Copy.

Original sent to H. M. Rayford, Feb. 8, 1905.

State of Alabama,
County of Mobile.

Know all men by these presents, That the Union Naval Stores Company, a corporation, does hereby nominate, constitute and appoint Price Williams, Jr., Judge of Probate in and for Mobile county, State of Alabama, its attorney to cancel on the records of said county the following mortgages:

That mortgage or deed of trust made by Rayford & Williams to George S. Leatherbury, Jr., on Nov. 8th, 1902, which mortgage is recorded in Miscellaneous Book No. S. N. S., pages 228-233, on or about Nov. 11th, 1902, which mortgage was assigned, transferred and set over to this company on Jan. 7th, 1903.

Also mortgage or deed of trust from H. M. Rayford to the Union Naval Stores Company, dated Dec. 21st, 1903, duly recorded in Mortgage Book No. 47, N. S., pages 121-128, on Jan. 21st, 1903.

In witness whereof the Union Naval Stores Company has caused this instrument to be signed by W. J. L'Engle, its president, and E. C. Hughes, its secretary, and its corporate seal to be affixed on this the 7th day of February, A. D. 1905.

Union Naval Stores Company,

By W. J. L'Engle,

By E. C. Hughes.

State of Alabama,
County of Mobile.

I, J. Macmurdo, a notary public in and for said State and county, do hereby certify that W. J. L'Engle, president, and E. C. Hughes, secretary, of the Union Naval Stores Company, whose names are signed to the foregoing instrument, and who are known to me, acknowledged before me on this day that being informed of the contents of the instrument, they executed the same voluntarily on the day the same bears date.

Given under my hand and official seal this the 7th day of February, A. D. 1905.

J. Macmurdo,

Notary Public Mobile County, Ala.

State of Alabama,
County of Mobile.

This deed of trust, made on this 21st day of December, A. D. 1903, Witnesseth:

That H. M. Rayford, of Mobile county, State of Alabama, hereinafter called the party of the first part, in consideration of the sum of sixty-seven hundred and fifty 00-100 (\$6750.00) dollars, to said party of the first part, in hand paid by the Union Naval Stores Company, a corporation organized under the laws of the State of West Virginia, called the party of the second part, the receipt whereof is hereby acknowledged, and in order to secure such other and further advances of money, goods, wares, merchandise, machinery, equipments, tools and supplies as may from time to time, until this deed of trust is fully paid and satisfied, be purchased for, or furnished, delivered or supplied to, the party of the first part by the said party of the second part, and to secure the due and full performance by said party of the first part of a certain contract called a shipping contract made this day by the parties hereto, reference to which is hereby made as a part hereof as well as in consideration of the sum of ten dollars to the party of the first part in hand paid by J. W. Wade, trustee, do hereby bargain, sell, assign, set over, convey and warrant unto the said trustee the following described property, in the county of Mobile, in the State of Alabama, that is to say:

One sixteen barrel turpentine still and all the fixtures and appurtenances thereunto belonging or appertaining, together with the location on which the same and the buildings appurtenant thereto or connected therewith, are situated, and the right to operate the same for naval stores purposes, and for the purpose of conducting a naval stores business at said place.

Also six horses and mules described as follows:

- 1 Bay mare mule named Dolly.
- 1 Gray mule named Jack.
- 1 Black mule named Kit.
- 1 Black mule named Pete.
- 2 Gray horses (not named).

Also 100 dip barrels.

Also two vehicles and harness described as follows:

- 2 two-horse wagons and harness.

Together with all harness, bridles and saddles appurtenant to said business or used on any animals in connection therewith.

Also all dip barrels and all tools, utensils and appurtenances and distillers' supplies, with all staves, headings, bungs, batting, glue, coopers' tools, and all materials for use in a cooperage business, and all buildings or erections of every sort on said premises, and generally all articles or things belonging to or for use in connection with said still or naval stores business.

Also all the books and open accounts, notes, checks, bills receivable and all debts and evidences of debt now accrued or hereafter accruing from said naval stores business or said store or commissary appurtenant thereto.

Also all of the following real estate, to-wit:

W. 1-2 and W. 1-2 of Sec. 1-4, Sec. 11, and Nw. 1-4 of Ne. 1-4, Sec. 14, Tp. 6 S., R. 4 West, in Mobile county, Ala.

Also, the following leases for turpentine purposes: said leases being hereby transferred, set over and assigned as additional security to the said trustee, his successor and assigns, together with all of the right, title and interest of the said party of the first part of, in, and to the premises described, and the rights and privileges thereby granted, for the length of time and in the manner specified in each of said leases respectively, to-wit:

Lease dated Aug. 13th, 1903, made by Roda Brinkman to S. J. Walter, and conveying the following described lands: S. 1-2 of the Ne. 1-4 of Sec. 26, Tp. 5 S., R. 4 W.

Lease dated Dec. 5th, 1902, from H. Maples to S. J. Walter for Sw. 1-4 of Sec. 17, Tp. 6 S., R. 4 W., in Jackson county, Miss.

Lease dated Dec. 31st, 1902, from Virgil Davis to S. J. Walter for N. 1-2 of Ne. 1-4, and Ne. 1-4 of Nw. 1-4, and W. 1-2 of Nw. 1-4, and E. 1-2 of Sw. 1-4, all in Sec. 17, Tp. 6 S., R. 3 W.

Lease dated Jan. 6th, 1903, from B. Webb to S. J. Walter, for Se. 1-4 of Nw. 1-4, and Sw. 1-4 of Ne. 1-4, and E. 1-2 of Nw. 1-4, and N. 1-2 of Se. 1-4, Sec. 9, Tp. 5 S., R. 4 West.

Lease dated Jan. 22nd, 1903, from Ellis Clarke to S. J. Walter, for E. 1-2 of Ne. 1-4, Sec. 17, Tp. 6 S., R. 4 W.

Lease dated Dec 20th, 1902, from H. S. Smith to S. J. Walter, for Sw. 1-4, Sec. 3; S. 1-2 of Nw. 1-4, Sec. 3, T. 6 S., R. 4 W., 12 inches and up.

Lease dated Dec. 9th, 1903, from Thos. Lamb to S. J. Wal-

ter, for Sw. 1-4 of Sec. 13, Tp. 6 S., R. 4 W., except 40 acres on the north side, making a total of 120 acres.

Lease dated Dec. 8th, 1902, from John Holland and wife to S. J. Walter, for W. 1-2 of Nw. 1-4, Sec. 13, T. 6 S., R. 4 W.

Lease dated April 13th, 1903, from Freeland Ros to S. J. Walter, 80 acres of land with boxes for turpentine for turpentine purposes until Sept. 1st; later date, 1903, and more particular described as S 1-2 of Nw. 1-4, Sec. 4, Tp. 6 S., R 4. W.

Lease dated March 6th, 1903, from W. R. Clarke to S. J. Walter for lot 2, and S. 1-2 of lot 1, Sec. 20, Tp. 6 S., R 4 W.

Lease dated Dec. 3, 1903, made by L. I. Freeland to H. M. Rayford, for Ne. 1-4 and Ne. 1-4 of Se. 1-4 and fraction B, all in Sec. 29, and E 1-2 of the Se. 1-4, Sec. 33, all in Tp. 5 S. R. 4 W., in Mobile Co., Ala., 500 acres on west side of State line in Jackson Co., Miss., and in Sec. 30, Tp. 5 S., R. 4 W., a total of 1100 acres.

Lease dated Dec. 12th, 1903, made by L. I. Freeland to H. M. Rayford, for S. 1-2 of Se. 1-4, of Sec. 22, T. 5 S., R. 4 W., and the Ne. 1-4 of Sec. 21, T. 5 S., R. 4 W.

Also any other leases, leaseholds or other interests in lands now owned or hereafter during the continuance of this contract, or until the indebtedness and obligations hereby secured are fully satisfied and discharged, acquired by said party of the first part, together with all the right, title and interest of said party of the first part, of, in and to, the property covered thereby or described therein and the rights and privileges thereby granted, for the length of time and in the manner specified in each such lease or conveyance of leasehold or other interest in land.

Also, all buildings, shanties and other structures, whether on lands herein described and conveyed or on other lands, with full right of access to same and the enjoyment thereof.

Also all the turpentine boxes, together with all rights appurtenant thereto, and all product therefrom whether on lands covered hereby or on other lands, now owned or controlled by the party of the first part, or which may be acquired or controlled by the party of the first part during the continuance of this contract. Hereby warranting that the party of the first part has at the present time and will cup the following:

Ten crops (containing 10,500 boxes each) of virgin boxes, to be cut prior to 4-1-04; five crops (containing 10,500 boxes

each) of yearling boxes; four crops (containing 10,500 boxes each) of third year boxes and fourth year. Also, all **crude** and manufactured turpentine, spirits turpentine, rosin and other products owned or in any manner acquired by the party of the first part during the continuance of this contract, including all crude turpentine in the boxes, at the still, or elsewhere, and all products of said naval stores farm and business of every kind and character, and all which may during said time be purchased, gathered or manufactured by the servants of said party of the first part or by any one for said party, whether on any of the lands or leaseholds described herein or other lands. Also, all growing crops or every description, both before and after severance from the lands.

Also, any increase of the above property or any part thereof until this deed of trust is fully satisfied and discharged.

Also all the other property, real, personal and mixed, now owned, or hereafter during the continuance of this contract acquired by said party of the first part, situated in said county of Mobile, and State of Alabama, saving and excepting herefrom all stocks of goods kept for sale now or hereafter contained in the commissary or store of said party of the first part.

Together with all and singular the tenements, hereditaments, rights, members, privileges and appurtenances, thereunto belonging or in any wise appurtenanting.

To have and to hold the above described real, personal and mixed property, leases and rights, unto the said trustee and any successor in said trust forever.

And the said party of the first part hereby expressly covenants and agrees that all of the property hereby conveyed is owned by said party of the first part in fee simple, and that said party of the first part has full right, power and authority to convey or mortgage the same, that all said property and each and every part thereof, is free from encumbrances of whatsoever kind, and that during the continuance of this contract the same will be kept free from all other mortgages, judgments, liens or encumbrances of any sort, whether by law or contract; and should said party of the first part suffer said property or any part thereof, or the title thereto, to become encumbered or impaired, or charged with any lien, mortgage, judgment, or other encumbrance, said company may without notice declare all sums hereby secured presently due and payable, and it or

the said trustee, may immediately proceed to foreclose as hereinafter provided.

And the party of the first part hereby covenants and agrees that said party of the first part will not box, cut or work any trees upon land of the United States, or upon any lands which have not been fully proven up, and that said party of the first part will not purchase or in any manner acquire any crude turpentine or manufactured turpentine or rosin gathered or produced from trees upon lands of the United States, or upon any lands which have not been fully proved up; and should said party of the first part violate any of the covenants and agreements in this paragraph contained said company may without notice declare all sums hereby secured presently due and payable, and it or said trustee may proceed immediately to foreclose as hereinafter provided.

It is further expressly understood and agreed that should said party of the first part violate or fail to fully perform all or any of the obligations or duties incumbent upon said party of the first part by the terms of said contract called a shipping contract, of even date herewith, or should said party of the first part without the written consent of said company first obtained, conceal, sell, pledge, mortgage or otherwise dispose of, or attempt to conceal, sell, pledge, mortgage or otherwise dispose of any of the property now on hand or hereafter acquired which shall be conveyed or covered by this deed of trust, said company may at its option and without notice declare all sums hereby secured presently due and payable, and it or said trustee may proceed at once to foreclose as hereafter provided.

This conveyance is made in trust nevertheless, and upon the following terms and conditions: That if said party of the first part shall promptly pay to the said party of the second part the sum of sixty-seven hundred and fifty dollars, according to the tenor and effect of the seven promissory notes, all bearing even date herewith, each payable to the order of said party of the second part at the office of said party of the second part in the city of Mobile, the amounts and dates of maturity of said notes being as follows:

One note for seven hundred and fifty dollars, due June 1st, 1904.

One note for one thousand dollars, due July 1st, 1904.

One note for one thousand dollars, due August 1st, 1904.

One note for one thousand dollars, due September 1st, 1904.

One note for one thousand dollars, due October 1st, 1904.

One note for one thousand dollars, due November 1st, 1904.

One note for one thousand dollars, due December 15th, 1904.

as the said notes severally fall due, together with interest thereon at the rate of eight per cent. per annum as provided in said notes, and also any renewals and extensions thereof; and shall also pay what may be due the said party of the second part for moneys advanced and supplies and merchandise bought for, or sold, or delivered to said party of the first part as aforesaid, and all costs incurred on account of this deed of trust; and shall further keep and fully perform all the covenants contained in this instrument and said shipping contract hereinabove referred to as part thereof, then this deed of trust shall be void as to the indebtedness contracted to this time; but if default be made in the payment of said notes, or any of them, or any renewals or extensions thereof, or of said indebtedness, or any part thereof, or any subsequent indebtedness due by said party of the first part and secured by the deed of trust, or if the party of the first part shall fail to fully and completely keep and perform all the covenants contained in this instrument or in said shipping contract hereinabove referred to as a part of this instrument, said company may, at its option and without notice, declare all indebtedness secured by this deed of trust presently due and payable; and in case of such default or such breach said trustee, or said company, may take possession of said property or any part thereof, without notice of any kind, and may after having given notice by advertisement once a week for three successive weeks of the time, place and terms of sale, in any newspaper published in the county of Mobile, State of Alabama, sell any or all of said property for cash, or for part cash and the balance on credit, at public auction, either at the place where the same is situated or in front of the court house of said county where the advertisement is published; and the proceeds of said sale shall be applied, first, to the costs of sale and keeping the property, and trustees' fees hereinafter provided, and all reasonable attorney's fees incurred in and about such foreclosure and the administration of this trust; second, to the payment of all taxes that may

be due on said property, or that may have been paid by said trustee or said party of the second part on said property; and third, to the payment of said notes or any other indebtedness due by said party of the first part to said party of the second part, application to be made at the discretion of said company; and fourth, if there be any surplus, the same shall be paid over to the said party of the first part.

And it is further agreed that if it shall become necessary to employ an attorney to collect the debt hereby secured, or any portion thereof, either by a foreclosure of this deed of trust by sale under the power herein contained, or by bill in equity, or by an action at law, then the party of the first part shall pay and allow a reasonable attorney's fee, and this deed of trust shall stand as security for the payment of the same.

And the said party of the second part, its assigns or successors, may at any time they see fit to do so, appoint a trustee in the place of the trustee hereinabove named, by indorsement hereon or by separate written instrument, which successor shall have all the powers, duties and privileges and be vested with all the title of the trustee above named; said substitution shall be recorded before any sale hereunder, but shall become effective immediately upon execution without regard to recording.

And the said trustee or his successor, may at any time, either before or after default, take the said property into his possession, or may take any part thereof, and may hold the said whole or part until said payments are made or said property sold as aforesaid, or he may use and operate the same for the purpose of carrying out in all the terms and conditions thereof, the contract above referred to and entered into between the party of the second part and the party of the first part.

And the party of the first part hereby agrees to pay all taxes assessed against said property before the same shall be delinquent; and in the event that said party of the first part shall fail or refuse to pay the taxes on said property or any part thereof, as herein provided, then the said party of the second part or said trustee, may pay the same, and the money so paid shall become part of the debt hereby secured, and shall bear interest at the rate of eight per cent. per annum.

And it is further agreed that the party of the first part

shall at said party's own expense keep all the buildings, fixtures and improvements on said property in as good condition as they now are.

Said party of the first part does hereby promise and agree to pay said trustee or his successor a reasonable fee for his services, and should he need legal advice said party of the first part agrees to pay a reasonable attorney's fee therefor; all of which shall be secured by this deed of trust.

And said party of the first part does hereby authorize the said trustee, or his successor, to conduct any sale or sales made under the powers herein contained, to make deed or deeds and bill or bills of sale to the purchaser or purchasers, and title so made the party of the first part hereby agrees to warrant and defend against the lawful claims of all persons. And said party of the first part does hereby authorize the said party of the second part, and the said trustee or any of them, to bid at sale and to become the purchaser of said property or any part thereof, should they or either of them see fit to do so.

All the rights, powers and privileges herein secured to the said party of the second part shall inure to the benefit of the assignee of the debt herein secured should the same be assigned or transferred.

All recitals made in any deed or bill or sale made pursuant, or purporting to be made pursuant, to the powers of sale herein contained, shall be competent evidence of the facts herein recited.

If the party of the first part be a partnership or more than one person, this instrument and each and every part thereof shall be construed as a joint and several obligation upon each member thereof, and the same shall be fully binding and effective against the survivors or successors of them; likewise the property owned or hereafter acquired by said party of the first part as covered hereby shall be held to embrace the after acquired property of each of them jointly and severally; likewise the indebtedness secured shall be held to be the indebtedness of each and every one of them jointly and severally.

In witness whereof the party of the first part has hereunto set his hand and seal this the 21st day of December, A. D. 1903.

H. M. Rayford.

State of Alabama,
County of Mobile.

I, J. Macmurdo, a notary public in and for said State and county, do hereby certify that H. M. Rayford, whose name is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day, that, being informed of the contents of the instrument, he executed the same voluntarily on the day the same bears date.

Given under my hand and official seal this the 21st day of December, A. D. 1903.

J. Macmurdo,
Notary Public, Mobile County, Ala.

State of Alabama,
Mobile County.

Probate Court.

Dec. 21, 1903.

Filed in office this day and duly recorded in Mortgage Book No. 47, N. S., pages 121-128.

Price Williams, Jr.,
Judge of Probate.
By H. O. Haynie, Clerk.

State of Alabama,
Mobile County.

I, Price Williams, Jr., Judge of Probate for said county, hereby certify that the following privilege tax has been paid on the within instrument as required by acts 1902 and 1903., viz., \$10.20.

Price Williams, Jr.,
Judge of Probate.
By H. O. Haynie, Clerk.

All notes sent Rayford 2-8, 1905.
Cancelled. (See inside.)

The parties hereto made certain admission of facts, as follows, subject to legal objection:

"Defendant admits that the Union Naval Stores Company obtained from H. M. Rayford & Company from April, 1904 to

April, 1905, under the mortgage and contract introduced in evidence, 508 barrels of spirits of turpentine containing 50 gallons each, and 1,533 barrels of rosin containing 280 pounds each; and from April 1, 1905, through December, 1905, said company obtained from H. M. Rayford & Company 486 barrels of spirits of turpentine and 1,539 barrels of rosin, which was all the turpentine and rosin obtained by the Union Naval Stores Company from Rayford & Company from all sources. This is not any admission that any part of said turpentine and rosin came from government lands, or from the land described in the complaint in this cause. Defendant further admits that it does not know what lands any of this stuff came from."

The defendant objected to the admission being introduced in evidence, unless it is shown where the turpentine and rosin described in the complaint came from. The court overruled the objection and the defendant reserved an exception to the ruling.

The parties made the following further agreement of facts:

"It is agreed between counsel on both sides that the highest market price for turpentine for the seasons 1904 and 1905 was 57 cents; that the lowest price during that year was 46 1-2 cents; that it fluctuated between those two in the course of the year; 1905 and 1906 it was 53 cents lowest and 79 cents highest, and fluctuated between those two. The highest price reached by spirits of turpentine between 1904 and present time is \$1.07 per gallon. That prices for 5 grades of rosin during those years was as follows: 1904-05 price was: Water white, \$3.75 to \$5.15; W. G., \$3.50 to \$5.00; K., \$3.10 to \$4.05; F., \$2.55 to \$3.00; D., \$2.50 to \$2.90 a barrel. During 1905-06, water white, \$4.00 to \$6.20; W. G., \$3.85 to \$6.10; K., \$3.50 to \$5.20; F., \$2.75 to \$4.75, and D., \$2.60 to \$4.10."

The plaintiff introduced the witness J. E. Buck, who testified that he surveyed a part of the land known as the homestead of Freeland in company with Mr. Hoisington. Witness ran the west line, the east line and the south line. Witness has not the notes made at the time. Has looked for the notes and cannot find them, but can tell what he did. At that time he had the field notes to be used. He had a lithographed copy.

"In making the survey we started at the northeast corner of 29 and ran east for one-quarter of a mile, being north of 40 acres between 21 on the north and 28 on the south; then we ran

south through section 28 one mile, reaching 1-4 of a mile to south quarter of said mile, being on the east line of Freeland homestead; ran then west on south line of Freeland homestead between 28 and 33 for 1-4 mile; continued west on the south line of fractional section 29 and still on the south side of Freeland to his southwest corner, being the intersection of the fractional section in Alabama and the fractional section in Mississippi—the intersection of the Mississippi line. At that time there were with me, Mr Hoisington, Tom Ransom, Lewis Freeland, Mr. Britton and a negro named Malone, and may be one or two others. In the center of the south half of the southeast quarter of 29 there was a cypress pond. Generally speaking, the land surveyed was open land. The pond would not occupy an area of but a few acres, say six. There was some small sloughs and branches that might have occupied another small area not to exceed but about 10 acres in the whole tract. Our survey was subsequent to the storm and there was very little timber on the land. I could not tell from the stumps or trees that were blown down the character of timber closely enough to serve. I judge that the average of the land would run from 2000 to 5000 or 6000 feet per acre. When timber falls down that way an estimate is a very wide approximation. I would not like to say unless I made a random shot like 2000 to 6000 feet. Understanding that my answer is an approximation only, I would guess 30 as the number of trees to the acre on that land that were blown down. I understood that I was there to point out the lands, that I was not to have anything to do with the other evidence, and did not pay any attention to the amount, hence did not fix it in my mind. As you ask me today, without having given attention to it, I would say 30, and I would also say it is possible that the thing might run as high as 60. That is why I preferred not to give an estimate, because it is not entirely competent. I would say that 30 is a conservative approximation."

On cross-examination the witness testified that he did not observe whether the timber was large or small. "I was distinctly given to understand when employed that I was there to point out the land, and if anything I made a business not to interfere with the other departments that were there to see that. My estimate, if I had any in mind with reference to the number of turpentine boxes that could be cut on that timber,

would be equally as elastic as my guess of the lumber capacity. I went there to run the lines and did not observe the timber."

Plaintiff introduced the witness Fred Hoisington, who testified as follows:

"I ran the Lewis 1. Freeland homestead. I had it surveyed and was present at the survey. My experience in estimating the amount of turpentine boxes on a given tract of land has been actually in the field counting boxes, estimating boxes and having other people make estimates on the same land. I suppose for the last four years that one-fourth of my time has been spent in the investigation of turpentine trespasses. The first time I examined this property was October 2, 1907, which was after the storm. I reviewed it again in 1908. My estimate of the boxes on the Freeland homestead was 50 boxes to the acre upon 175 acres. I meant that as an average. I have made similar estimates on timber of the same character and afterwards verified my estimate by actual count. I have done this many times. I have estimated timber on what I thought would be similar in the number of trees to the Freeland homestead. Upon the account, I generally found that my estimates were exceeded a little bit by the actual count. I noticed there were a few stumps that I supposed had been cut over. I found some on this land. I mean that there were some stumps, but not what we would call a general cutting over. The timber was good, fair, average size timber. My estimate was 1 1-2 boxes to the tree on the average. I made a count of certain trees which were blown down. From my count of those trees my recollection is that they ran from 70 to 73 streaks. The space chipped was five feet, according to my recollection. I mean the space from the box as high as it was chipped. They usually make from three to four streaks the first year before making a dip; four the second and four to five the third year. The average number of streaks per year depends on the work. Usually about 24 streaks; sometimes they put on 28 and sometimes 32. 24 is the average for a season, and one dip is made before they commence chipping the first year. Generally a turpentine man will not dip until the boxes average at least one pint to a dip; 1000 pints make 125 gallons, and therefore I figure 2 1-2 50 gallon barrels to 1000 boxes at a dip. That is the case if they average one pint. I think those boxes averaged more than a pint. I would think they would average 1 1-2 pints on the average.

Based on my estimate that there are 175 acres of 50 boxes to the acre, making 8750 boxes on that land, and the number of streaks I observed, my estimate of the number of barrels of crude gum obtained from 8750 boxes the first year would be about 140 barrels of 50 gallons each. That is based on seven dips of 2 1-2 gross barrels of crude to the 1000 boxes the first year. The second year I estimated at six dippings, the third at five dippings. I estimate 120 barrels of gum for the second year. My estimate is based on the land within the survey of the Freeland homestead. The lands are quite well marked."

On cross-examination the witness testified he was special agent of the general land office. "That about one-fourth of my time has been taken up in checking up turpentine trespasses, and I have often made inquiries of turpentine men in order to post myself in the line of work I was doing. I never had any turpentine business of my own. It is altogether government work." "When did you make this first estimate?" A. "October 7, 1907." Q. "And the second?" A. "Sometime in 1908, I believe." The survey which I spoke of was made in 1910. Both of my estimates were made before the survey. I run the lines myself with a compass which I carry. I am not a practical surveyor, but in my work I trace lines and run lines, doing this by pocket compass. In measuring the distance, I pace it, or if it is where I drive, I count the revolutions of the wheel. In walking or driving I go as straight as I can, and if I use my compass I can run a line closely. I first ran those lines October 2, 1907, and made both of my estimates before Mr. Buck surveyed it. I paced it on October 2nd, 1907. The next time I went to near the cabin which Freeland had on the homestead and went within that fraction B to the State line and drove back. The first time I made my estimate I went to the home of Cas Deakle, who lived on adjoining lands. He was not at home. Mrs. Deakle told me where I could find the corner. I went there. That would be at the southeast corner of the southwest quarter of section 28, or the northeast of the northwest of 33. I went to that stake and took my compass and run the section line between 28 and 33 westward, pacing the distance and noting it as my plat showed as near as I could by pacing it. I could tell where the line was on the west side from the stake because the timber south of the Freeland homestead had not been boxed on section 32, and that timber was not

blown down and there was a line. I could see the line right through. I verified that with my compass. I stopped, and on the south side of this sectional line on the northwest of the northwest of 33 I paced off an acre and counted the boxes on that acre. I then went back and took my section line where I had done this and ran on westward. I stopped on what we call the south half of fraction B of 29, and I again paced out an acre there and counted the boxes on it, and upon that based my estimate of 50 boxes to the acre. I do not remember just what I counted on each of the two acres, but it was such as I based my estimate of the average number of boxes at 50 to the acre. I got at my estimate from a general view of the land, and those two acres which I counted on. I made an actual count on two acres. I then estimated that the 175 acres would cut 50 boxes to the acre. That is very common with us. The way I got at the estimate was from my count and a general view. No other way. I made no figures at all. I had it all in my head. I walked across the northwest quarter of northwest of 33 so I could see over the southwest of the southwest of 28, and did the same thing on the southeast of the southeast of 29, and the south half of B. I do not remember how many trees I counted on either of these two acres I stepped off. My manner of selecting an acre was this. I stopped on the section line and paced out an acre; one about the middle of northwest of northwest of 33, and the other in fraction B. I made my line the section line on one side and paced off the acre distance. The second estimate I didn't count anything. I drove over it in a buggy and took a general view of it. I didn't see any reason to change the first estimate I made. I didn't make a new estimate, but thought my previous estimate was satisfactory and didn't make any change. I made no figures or measurements on the second trip. Nearly every tree of the timber was blown down on the tract. The trees down lapped over the lines. In running the lines I had to climb over the trees. I can pace a piece of land pretty close. I have had years of experience in doing that. I have paced lands in other storms, other lands, all over the country nearly. In giving my estimate of how many barrels of turpentine could be made the first and second years in my direct examination, I was speaking of the ordinary work. Of course if it was not worked well it would not be as much I have seen as high as 32 streaks put on per year, in which case

my estimate would be low. It depends on how late they work in the fall. There is also some variation in the seasons. The gum runs more during June, July and August than earlier or later. My figures that I gave on direct examination were presupposing that it was just ordinary work. I was basing it on ordinary turpentine work. I don't know how this particular land was worked, except for the space chipped. I judge by the number of streaks and space chipped. If they put on 24 streaks in a year, they work it tolerably regular in Alabama. In Florida they put on 28 because they begin earlier. I counted from 70 to 73 streaks. I suppose I counted that on half a dozen trees, but they were not all in the same place. The average per year would be about 24 streaks. The trees which fell down in that storm were pretty considerably mixed. It looked a little like the wind had changed there. I found the trees crossed considerably. I didn't put any special mark on the trees I counted, in the space of an acre it is not necessary. I put a stake where I started, and the length of an acre is not very far and I go over and put a stake on there and on a square acre a man doesn't need to count twice. You don't need to mark them particularly, to know that you don't count twice. I didn't mark them. The witness was asked, "Did you count the stumps or the bodies of the trees?" A. "There isn't much of a stump. The trees were generally broken off or turned over by the roots." There is not much of a stump, the trees were generally broken off and turned over by the roots. I counted what was the tree—I counted the tree if it was there, or the stob if that stood. I counted whatever the tree was. When trees over-lapped I counted where the tree had come up out of the ground. I didn't count it at the top, I counted the number of trees which had grown on the acre. An acre is 208 feet square. I paced 12 rods and 10 feet. That would be approximately about 200 feet. Q. "How many steps to the rod did you take?" A. "I take 5 1-2 if I undertake to pace 3 feet." In pacing out rods I usually allow a little bit. I didn't quite pace out three feet. 5 1-2 paces at 3 feet would be a rod. I called it 5 1-2 to 6 steps. Three feet to a step. There are 16 1-2 feet or 5 1-2 yards to a rod. If I came to a tree I would straddle over it and go on with my pacing. While the trees over-lapped where they grew thick enough, they would usually pile up in such a manner that you could step over them. The

storm blew some of those trees up by the roots. Some of them were broken two or three feet from the ground and others 10 or 12 feet from the ground. They were all blown down so that there was nothing for them to lodge on. The timber was blown down flat. Sometimes one tree would blow on the trunk of another lying on the ground."

The plaintiff introduced the following agreement of counsel:

It has been agreed between counsel on both sides that the various standard grades of rosin are as follows: Water White, Window Glass, N, M, K, I, H, G, F, E, D and B; B being the lowest and Water White the highest.

It is further agreed between counsel that the price of B rosin, the lowest grade, ranged about 10 per cent. lower than the price of D. The price of D is already in evidence.

Plaintiff introduced the witness John P. Pfleger, who testified that he was agent of the Louisville & Nashville Railway Company at Grand Bay. That he hunted for and could not find records of the office of shipments made at Grand Bay during the years of 1904-1905. That they must have been destroyed in the storm of 1906. "I can find no records of the railroad whatsoever, as far back as 1904-1905."

Plaintiff introduced the witness Mat Owen, who testified that he is now a farmer, but has been engaged in the turpentine business in the capacity of woodsman, manager, and distiller. He has been engaged in that business off and on for ten or twelve years. Witness was employed as woods rider for the Grand Bay Turpentine Co., or Mr. L. V. Pringle. "I think I began about the beginning of the season of 1906 in the spring. I remember the character of boxes known by the name of the Richard Hubbard boxes. I don't know anything about the land lines of the land on which the Richard Hubbard boxes were located. I am familiar with the Richard Hubbard boxes and rode through those boxes during the year 1906. I rode through them ordinarily once a day. It was my business to see that they were chipped and worked properly. To the best of my recollection and judgment, those Richard Hubbard boxes approximated about 50 to the acre. The witness was asked, "I wish you would state whether or not, when you first saw those boxes in 1906, you could tell from your experience as a turpentine man how many years those boxes had been worked?" A.

"About two years." Q. "Can you tell from the face of the tree the manner in which the boxes were worked, as an expert?" A. "As an expert I couldn't say just exactly, but I have a very good idea about it." Q. Can you tell approximately how they were worked?" A. "Yes sir, I can." I have been engaged as woods rider at different times, I guess about five years. I was also manufacturer and distiller. Based on my knowledge of these boxes as I saw them in 1906 and my experience as a turpentine man, my estimate is that during the two years before I began to ride through those boxes, they would yield about 2 1-2 gross barrels of crude turpentine to the thousand boxes at each dripping. According to the way the boxes looked, he would dip about twelve dippings in the two seasons. The boxes were about medium size. They were very well cut. Ordinarily about ten gallons of spirits of turpentine are obtained from a gross barrel of crude gum. We generally get about 3 barrels of rosin running from 400 to 600 lbs. each, to each barrel of spirits of turpentine. A commercial barrel of rosin, called a net barrel, is 280 lbs. A barrel of spirits runs from 48 1-2 to 52 gallons—about 50 gallons on the average. Every time you get 50 gallons of spirits you get about 3 barrels of rosin running from about 400 to 600 pounds each. I know where the still is that was operated by Mr. Rayford and afterwards by Mr. Pringle, or the Grand Bay Turpentine Company, but I could not tell the various grades of rosin manufactured by Rayford from first year gum. The grade of rosin varies according to how the stuff was handled. I don't know the distiller who worked for Rayford.

Plaintiff asked the witness this question:

"What is the general average of the grades for the first year, taking the average distiller? I wish you would state what grades they would obtain from first year gum."

Defendant objected to the question because there is no evidence that the distiller was an average distiller and there is no presumption to that effect. The court overruled the objection and the defendant excepted.

The witness answered, "Grade N, I would say, about an average grade. The highest grade he manufactured would be W. W., what we call Water White, and the lowest grade ordinarily manufactured out of first year gum is about M. The

average grade that an ordinary distiller would manufacture from second year gum from that still, would be about F. or G., somewhere along there. Properly handled, it would not average any higher or lower than F. or G."

Asked concerning the lowest grade that he would obtain, witness said he would have some of what we would call "strainer dip." "I am not very familiar with the numbers. I have forgotten some, not having been in the business lately. I have forgotten the initials all the way down, but the second year he would get some along about E. Which would be about as low a grade as he would get the second year. Ordinarily I don't think he would be likely to get any B grade of rosin, which is the lowest grade the second year. As the boxes get older, the grade of rosin obtained gets lower. The first year you get the highest grade, the second year lower grade, and keep on getting a lower grade as the boxes get older. When I first began to ride these boxes they were third year boxes, and I worked them the third year. I know where Lewis I. Freeland lived at that time. The best of my recollection is that his residence from the nearest point to any part of the Richard Hubbard boxes was about 300 yards. There was some boxes east of him, southeast and in fact all around to the southward and the southeast of him. Mr. Freeland's house was just north of the boxes. Mr. Deakle's house was southeast course from the boxes. A portion of the boxes was approximately between Mr. Deakle's house and Freeland's house. To the best of my recollection the still was about three miles from those boxes. The next nearest still from those boxes was about five miles away. Grand Bay was the nearest shipping point at that time to the Rayford still."

On cross-examination the witness testified that all of his direct testimony relates to the Richard Hubbard boxes. "I do not know how many acres it covered, even approximately. I worked all the Richard Hubbard boxes that I knew of. But do not know whether there were any others. In estimating how much spirits of turpentine and rosin and the grades derived from the first year's dip or second year's dip, I have been assuming in making such answers that the first year's dip was distilled by itself. If it was mixed with second, third and fourth years stuff, I could not tell much about it. My answer as to the grades that would be obtained from a particular

year's dip has been entirely upon the assumption that that year's dip was distilled separately from other stuff. If all the crude received at the still was put together in the still and came out in one mass, it would make a low grade, if it was old stuff. You could not tell about the grade unless you know what stuff the balance was. It depends somewhat on the distiller as to the grades that come out. And also depends on the manner in which it was dipped when it comes to the still. In my estimate I have assumed that it was properly handled before it was brought to the still. It would vary the grades if the stuff was dirty or had an unusual amount of bark or debris in it. I could not say what grades came out of it if some of the stuff had been properly handled and other stuff not properly handled and some was not clean and it was all mixed together. The witness was then asked, "Don't you get about a barrel of rosin from every six barrels of dip, isn't that the way it runs?" A. "No sir." Q. "How does it run in that particular?" A. "Get more rosin than that." Q. "How much?" A. "From six barrels of dip?" Q. "How many barrels of dip to get one barrel of rosin?" A. "I couldn't give that exactly. I don't know, coming right down to facts about it." Q. "A man of experience may calculate it that way and have a different opinion on the subject. I don't know whether or not you have?" A. "No sir, I don't know exactly." Q. "You couldn't give us an approximate idea of how many barrels of dip it would take to get a barrel of rosin?" A. "Something like about two barrels." Q. "Two barrels of dip would get one barrel of rosin?" A. "Yes." Q. "How do you square that with your other estimate in which you said you would get ten barrels of spirits to one barrel of crude and it would take 50 gallons to get a barrel and three barrels of rosin to every barrel of spirits? That couldn't very well be squared with your present estimate that you would get two barrels of rosin with every barrel of dip?" A. "No sir." Q. "Which would be right? You have given two estimates." A. "I think you asked the question, how many barrels of crude would it take to produce one barrel of rosin?" Q. "You said that ten gallons of spirits would come out of one barrel of crude?" A. "Yes sir." Q. "You told us it would take 50 gallons of spirits to make one barrel of spirits?" A. "Yes sir." Q. "And that three barrels of rosin every time you get one barrel of spirits?"

A. "Yes sir." Q. "You tell us again in the other estimate it would take two barrels of crude to make one barrel of rosin? Is that right?" A. "That is what I said. I may have made a miscalculation." Q. "I am trying to direct your attention to the question to see what you have to answer now?" A. "Ordinarily, this 10 gallons to each barrel is about correct, and to 50 gallons of spirits approximately three barrels of rosin, that is correct. If I have made a miscalculation on this other thing—" Q. "You are not in the habit of estimating the other way?" A. "No sir." The question of how much spirits comes out of each barrel of crude depends on the character of the barrel of crude. If there is a lot of dirt in it, there is no turpentine in dirt, and if we have bark, we don't get any turpentine out of that. It makes a difference what year it has been run, whether it was first, third, or fourth, or whether it is straight or dipped. To tell how much spirits you get out of a barrel of crude, you have to know whether it is clean or dirty, or the first or fourth year, and all of those things. The witness was then asked: "If I told you this stuff we are talking about, some of it was first year and second year dip that had been mixed together with a lot of other stuff, that I couldn't tell whether it was good, bad or indifferent, or clean, or old or new, except that the new stuff had been mixed with the old stuff, and I could not tell you the proportion in which it was mixed, and ask you how much spirits would come out, you couldn't give any answer, couldn't tell anything about it, without more data than that?" A. "No, I couldn't tell unless I know what was in it." Some of the land covered by the Richard Hubbard boxes had more timber than other parts of it. Some acres are practically bare of pine timber, and other acres tolerably well filled. Some portions of the timber was better timber for turpentine purposes than other portions. Not knowing the number of acres that was covered and having no approximate idea about it, and not knowing how the land lay, I couldn't tell how the timber ran. All I can do is to give a general average including all of it. I couldn't tell what part of the Richard Hubbard boxes was homestead and what part of it was not.

On re-direct examination, the witness answered that the land covered by the Richard Hubbard boxes didn't average exactly the same. "Sometimes there were little vacant places on

it that I remember of. The part of the land which had the smaller amount of boxes was that near Freeland's house."

Plaintiff asked the witness this question:

"You spoke about if they mixed gum of various years together that it would not produce the same grades. Is it customary and usual to mix virgin with any other gum?"

Defendant objected to the question because the testimony in this case shows what was done. It shows that the turpentine that went to the still was put on the same platform and it was intermingled and put in the still and that the stuff that came from the land was not separated.

The court overruled the objection and the defendant excepted.

The witness testified that it was not customary to mix virgin with old gum.

Plaintiff asked the witness this question:

"Is it customary to mix two or three year gum together?"

Defendant objected because it is incompetent, irrelevant and immaterial and he is not bound by the custom.

The court overruled the objection and the defendant excepted.

Witness answered that it was not customary. "In my cross-examination when I stated that two gross barrels of dip make one barrel of rosin, I meant the kind of barrels which we used that average about 400 pounds, I guess."

Plaintiff re-called the witness Lewis I. Freeland, who testified further as follows:

"Richard Hubbard started to chipping the homestead that they claimed. The Richard Hubbard boxes didn't cover all of the homestead. The 80 acres that I lived on was included and there was a piece lying north of that that he chipped. That was all I think he chipped on two forties and then he turned north. That homestead lay in a long strip and one forty lays back south and one here, and there was a forty in front of the place and a piece north there that he chipped. There was a place north of my place that he chipped and my place and the homestead that he chipped. He didn't chip the 40 that lay in 33. One forty of my homestead he didn't chip. He did chip the balance of my homestead and 40 acres besides in Section 28, as well as I remember."

Being asked how many acres there are in the Richard Hubbard boxes, the witness answered, "It was all in there except one forty, as I told you. He chipped this strip and the 40 in 28, and a little piece north of my place. The area covered by his boxes was the amount of my homestead plus 40 acres of mine. But he didn't chip 40 acres that was in the homestead. As to the number of acres he left out one forty and chipped one forty in another piece of land. I know Mr. Lyman Rayford."

Being asked whether he showed Mr. Lyman Rayford the lines of this land, the witness answered, "I set up some knots on the south line up to this homestead. That is, the first year. I stopped him when he came up to that line. That is when he was cutting some land in 1902. I didn't show him the land at any later time. I showed him the south line of it part of the way. I showed him half of it. I testified that I was present at a survey made by Mr. Holder and Mr. Duncan on this land. I testified that the Richard Hubbard lands covered all the homestead except forty acres, and covered forty acres just north of that. In testifying about the land called my homestead, I testified with reference to the survey made by Holder and Duncan. I am identifying the land by that survey, but they changed a little when they ran, from what we thought the lines were. They moved the line about 50 yards. It was the east and west lines they moved. They made it less than what I showed Mr. Rayford. They moved the line back further north from what I had it before. Other than that the lines were the same. I didn't step it off. It was something like 50 yards. Mr. Lyman Rayford was tallying when I set up those chunks for him. I don't believe he tallied any boxes on my homestead."

Plaintiff introduced the witness Allen G. Holder, Jr., who testified that he is the surveyor who surveyed the Freeland homestead. It was surveyed April 20, 1911. The southwest of southwest section 28; the northwest of the northwest of 33. and the south half of the south half of the south half of fraction B, section 29, that is, a portion of south half of south half of 29, lying between west boundary of 28 and the Alabama and Mississippi boundary. I had with me the original field notes of the government at that time, and I checked my survey with those field notes. We ran all the boundary lines and closed up the work within reasonable limits. Made a very

good close. Mr. Freeland, Mr. Long and Mr. Duncan were with me. This is in Township 5, range 4 west. I don't remember whether lots three and four is the same as fraction B. If you let me have the notes may be I can tell you to see that they check with my notes. Upon examining the field notes, lots three and four are the same as the south half of fraction B. That is, it is the south half of the south half of that portion of fraction of 29 lying between the east boundary of 29 and the Alabama and Mississippi lines. The two descriptions are of identically the same land."

Thereupon plaintiff introduced said field notes, as follows:

The State of Alabama.

Department of State.

I, Cyrus B. Brown, secretary of state, do hereby certify that the pages hereto attached, contain a true, accurate and literal copy of field notes and plat of Secs. 28, 29 and 33, of Township 5, South of Range 4 West, St. Stephens meridian, Alabama, of Section 25 and plat of same of Tp. 11, N. R. 8 East, St. Stephens meridian, Alabama, and of Section 31 and plat of same of Tp. 2, N. R. 3 E., St. Stephens meridian, Alabama, as the same appears on file and of record in this office.

In testimony whereof, I have hereunto set my hand and affixed the great seal of the State, at the capitol, in the city of Montgomery, this 11th day of April, one thousand nine hundred and eleven.

(Seal.)

Cyrus B. Brown,
Secretary of State.

FIELD NOTES OF SECS. 28, 29 and 33, TP. 5, S. R. 4 W., ST.
STEPHENS MERIDIAN, ALA.

Sec. 28.

N. E. corner from which

N 16 E 81 pine

S 39 E 67 pine

S 72 W 1.08 pine

N 81 W 93

Thence south

80 00 1-2 S. post from which

S 46 E 58 pine

S 12 W 28 do.

160 00	Southeast corner from which			80.00
	N 15 E 38 pine	4	5	27
	S 35 E 61 do	4	5	34
	S 30 W 43 do	4	5	33
	N 28 W 60 do	4	5	28
	Land level poor pine			
	N. W. corner from which			
	N 44 E 25 pine	4	5	21
	S 56 E 21 do	4	5	28
	S 25 W 19 do	4	5	29
	N 70 W 17 do	4	5	20
	Poor pine, black jack and palmetto ridges			
	Thence east			
160 06	To the corner departed 50 lks. south			80.06
	Correct back			
	N 14 E 79 pine			
	S 53 W 51 do			
	Poor pine land a little rolling.			
	Beginning at N. W. corner thence south			
18 00	Enter head S. S. W.			
12 00	Leave it			
25 00	Enter again and run down it			
48 00	Leave the swamp to the right			
80 00	1-2 S. post from which			
	S 82 E 9 pine			
	S 47 W 43 do.			
160 00	Southwest corner			80.00
	N 5 E 42 pine	4	5	28
	S 36 E 11 do	4	5	33
	S 21 W 30 do	4	5	32
	N 15 W 41 do	4	5	29
	North half rolling with swamp—residue			
	level pine land			
	Begins at the southwest corner thence east			
83 00	Crossed a wet weather branch south			
160 06	To the corner departed 39 lks. south			80.06
	Correct back			
80 03	1-2 S. post from which			
	N 3 E 66 pine			
	S 40 E 54 do			
	Level poor pine land.			

Frac. Sec. 29.

The east line of Sec. 29 same as west
line of Sec. 28.

Beginning on the north boundary at its
intersection with the State line thence
with south boundary east

111 04 To north east corner 55.54

Returning to the beginning thence with the
State line S 2 deg. 30 min. E.

2 00 Crossed bayou which makes out of Cantuppoha, Right

19 00 High land

30 00 Crossed a bend of a small bayou, Right

159 08 North boundary of Sec. 32 (S. W. corner of 29) 79.58
Thence east

104.26 To the south east corner 52.26

Sec. No. 33.

North line Sec. 33 same as south line of Sec. 28.

S. E. corner from which

N 30 E 32 pine 4 5 34

S 55 E 18 do 4 6 3

S 40 W 44 do 4 6 4

N 65 W 36 do 4 5 33

Thence west level rolling poor pine with swamp.

80 00 1-2 M post from which

N 57 W 34 pine

S 75 W 39 do

107 00 Enter swamp

12200 Crossed a creek 12 lks wide W. S. W.

138 00 Leave the swamp

160 00 S. W. corner from which 80.00

N 86 E. 33 pine 4 5 33

S 46 E 55 do 4 6 4

S 9 W 74 do 4 6 5

N 9 W 24 do 4 5 32

Rolling poor pine land with swamp.

Beginning at the north east corner thence south

163 17 to the corner departed 122 lks west 81.67

Correct back

81 33 1-2 S. post from which

S 71 E 19 pine

N 32 W 71 do

Level poor pondy pine land.

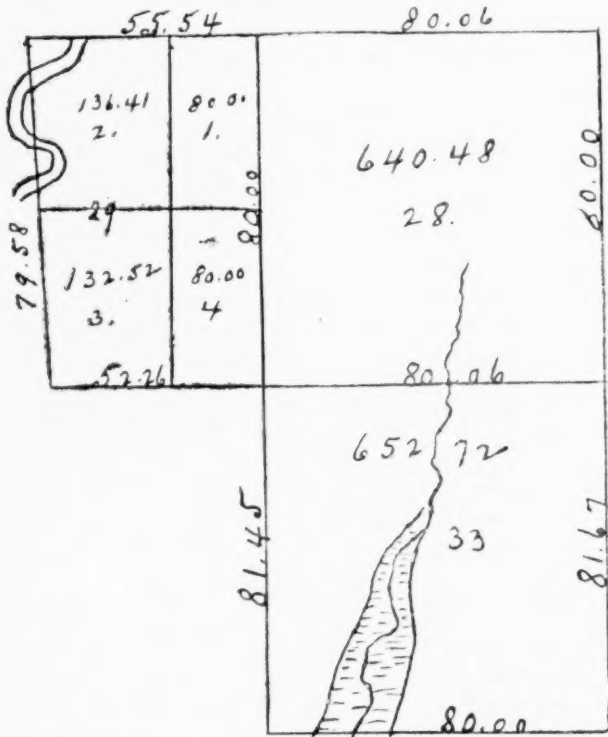
Beginning at N. W. corner thence south to the
162 45 S. boundary departed 137 lks W.—correct back 81.45

81 22 1-2 S. post from which

N. 18 E 22 pine

S 68 W 21 do

Level poor pine land.



FIELD NOTES OF SEC 25, TP. 11, N. R 8 E., ST. STEPHENS
MERIDIAN, ALA.

Sec. 25.

S. E. corner from which

N 50 W 0c.46 pine 18 8 11 25

N 35 E 0.38 black oak 18 9 11 30

S 58 E 0.27 post oak	10	9	11	31
S .09 W 0.47 post oak	10	8	11	36

Thence north land rolling 3rd rate growth pine

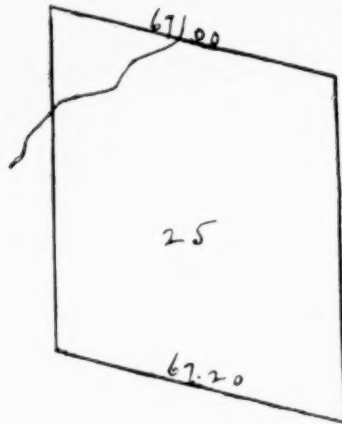
7 50	X a branch 0c.05 wide bears N. E.			
16 00	X a road bears west			
28 00	X a branch 0c.05 wide bears N. E.			
39 50	X a road bears N. E.			
67 00	X a branch 0c.05 wide bears east			
80 25	N. E. corner from which			
	N 40 W 0.35 red oak	18	8	11 24
	N 46 E 0.64 pine stump hole	18	9	11 19
	S 48 E 0.70 post oak roots	10	9	11 30
	S 84 W 0.58 red oak stump hole	18	8	11 25
	S. W. corner from which			
	N 30 E 0.55 chestnut		11	25
	S 62 W 0.72 black jack		11	35
	S 78 E 0.30 black jack		11	36
	N 57 W 0.35 pine		11	26

Thence north 3rd rate hilly

39 96	1-4 S. post			
40 00	1-2 mile post from which			
	S 27 E 0.17 oak, 1-4 S.			
	S 14 W 0.21 dogwood, 1-4 S.			
55 00	X a branch bearing east			
79 22	N. W. corner from which			
	N 52 E 0.29 pine		11	24
	S 75 W 0.61 pine		11	26
	S 70 E 0.22 pine		11	25
	N 27 W 0.46 dogwood		11	23

Thence S 73 deg. 45 east

30 00	X a branch bearing north			
33 50	1-4 Sec. post from which			
	N 80 W 0.12 sourwood 1-4 S.			
	S 30 W 0.37 pine 1-4 S.			
67 00	N. E. corner			
	Begin at S. W. corner thence S. 73.45 east			
33 60	1-4 S. post from which			
	N 25 E 0.29 pine 1-4 S.			
	S 56 W 0.50 pine 1-4 S.			
67 20	S. E. corner			



FIELD NOTES OF SEC. 31, TP. 2, N. R. 3 E., ST. STEPHENS
MERIDIAN, ALA.

S. W. corner from which

N 12 E pine 0c.48.	18	3	2	31
S 29 E pine 0.50	16	3	1	6
S 33 W pine 0.49	18	2	1	6
N 26 W pine 0.54	18	2	2	36

Thence north land rolling 3rd rate growth pine

40 40 1-2 mile post from which

N 73 E 0c.29 pine 1-4 S.

S 21 W 0.35 dogwood 1-4 S.

50 00 X a plat branch 0c.50 wide bears west

80 26 N. W. corner from which

N. 17 E 0c.55 pine	8	3	2	30
S 69 0.63 pine	18	3	2	31
S 44 W 0.54 pine	14	2	2	36
N 27 W 0.32 pine	12	2	2	25

S. E. corner from which

N 47 E 0c.00 pine	12	3	2	32
S 44 E 0.62 pine	15	3	1	5
S 75 W 0.98 pine	16	3	1	6
N 33 W 0.88 pine	18	3	2	31

Thence west land rolling 3rd rate growth pine

40 00 1-2 mile post from which

N 46 E 0c.27 pine 1-4 S.

S 71 W 0.48 pine 1-4 S.

85 37 South west corner 85.37

Beginning at the north west corner thence east
land rolling 3rd rate growth pine

40 00 1-2 mile post no pointers

81 64 N. E. corner from which

N 71 E 0c.30 pine 16 3 2 29

S 71 E 0.51 pine 28 3 2 32

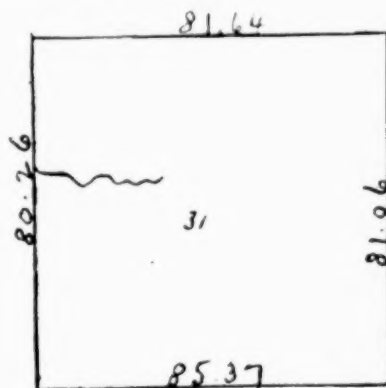
S. 72 W 0.24 pine 16 3 2 31

N 12 W 0.27 pine 14 3 2 30

Thence south land rolling 3rd rate growth pine

40 00 1-2 mile post no pointers

81 06 South east corner



On cross-examination the witness stated that his authority for declaring fraction B the same as lots three and four is that "I have fraction B here on my map. I made my fraction B identical with those fractions three and four. I made a re-survey and made a map of it and called it fraction B. That is just as good."

Being asked, "This designation as fraction B is your designation and not the government's designation?" the witness answered: "I can call it my designation, but it may be designated by fraction B somewhere else. I can't tell you where else it is so designated. The south half of south half of 29 is the same as fractions three and four. They are identical.

Calling it fraction B is simply my designation, but I make it identical with the government. I can't show you now that the government has designated that as fraction B. When the district attorney showed me these field notes introduced in evidence that was not my authority for stating it was fraction B. From the field notes I stated that it was lots three and four. It is my designation of fraction B. In order to locate a piece of land you can call it anything."

On re-direct examination the witness testified:

"I prepared a map of the land I surveyed. The field notes in evidence show lots three and four. The land I surveyed was the south half of lot 3 and lot B in Sec. 29, and southwest of southwest of 28, and northwest of northwest of 33. What I call fraction B is block three and four in the field notes. According to my notes the land that I surveyed is the south half of lots three and four, Sec. 29, southwest of southwest of 28, northwest of northwest of 33, all in Township 5 S., range 4 W."

The plaintiff here offered in evidence pages 54 and 55 of track book No. 47 of the United States land office at Montgomery, Ala., covering Township 5 S., range 4 W.

Plaintiff introduced the witness Tom Ransom, who testified that he worked for Mr. Rayford in the turpentine business before the big storm. "Just one year before the storm. I chipped boxes for Mr. Rayford. I know the Richard Hubbard boxes, but I didn't chip them while they were in charge of Mr. Rayford. They were in charge of Mr. Pringle the year I chipped them. I don't know how many boxes there were in the Richard Hubbard boxes."

It is admitted by the defendant that the district attorney has authority from the attorney general of the United States to bring this suit.

Thereupon the plaintiff rested.

Thereupon the defendant rested.

This was all the evidence in the case.

Thereupon the court charged the jury orally as follows:

Gentleman of the Jury:

The plaintiffs, who are the United States, sue the defendants, who are the Union Naval Stores Company, for what is called an action of trover and conversion, wherein the United States seeks to recover from the defendants a sum of money,

designated as damages, for an alleged conversion by the company of a quantity of turpentine and rosin which it is claimed by plaintiffs was made from crude gum that came from lands belonging to the United States and described in the complaint and known as and called the "Freeland Homestead," and in which the government says was an unperfected entry of homestead by said Freeland, and that the title was in the United States at the time of this alleged taking of crude gum and converting it as it is claimed: manufacturing turpentine and rosin from that crude gum.

The defendants plead not guilty; that is, the general issue, in a case of this character: just denies the allegations of the complaint.

It therefore devolves upon you, under the charge of the court as to what the law of the case is, (as the court understands it), and to govern you in your action so far as the law is concerned, to find what the facts in the case are: what the evidence establishes by facts and circumstances which have been introduced and brought to your attention by the witnesses, and by the documents, some of the evidence being documentary.

I believe there is no controversy and no dispute, and, therefore, it may be said it is admitted, that the land described in the complaint belonged to the United States at the time of this alleged trespass and conversion. This man Freeland has made an application for a homestead entry, but it never was perfected, and he afterwards relinquished it; but that matters not, so long as it was an unperfected homestead entry it was government land, and no one would have the right to trespass on it and carry off the crude gum and manufacture it without authority from the government, which it is not contended was given in this case.

There is another admission, as I understand it; that the market value of turpentine and rosin of the various grades and quantities was such and such a price at a certain time. You probably remember the figures, but if you do not, counsel can doubtless furnish you with a statement as to those prices, so you can have them before you, so that if you find for the plaintiffs you can fix the quantity. I believe the prices agreed upon was the market value of turpentine and rosin at the time it is alleged to have been delivered to defendant, and also what

has been the highest market value between that time and this. I do not remember that there was any other agreement as to value than those two.

It is claimed that a man by the name of Henry Rayford had a contract with the defendants to acquire, either by manufacture or otherwise, certain turpentine and rosin to be delivered to defendants, and that the defendants had a mortgage on all turpentine and a certain amount of rosin that might be acquired, or in any way obtained, by this man Henry Rayford, and it is claimed by the government in this case that Henry Rayford cut, or caused to be cut, a number of turpentine boxes and had them worked, in the years 1904 and 1905, I believe they state; however, the evidence establishes the years 1904 and 1905 without controversy, I believe; that this man Henry Rayford caused to be taken from the boxes, thus worked on the land, the crude turpentine gum, and manufactured the same into turpentine and rosin, and delivered it to the defendants. That is the charge in the complaint.

(a) If you believe from the evidence that Henry Rayford knew, or had notice that the land described in the complaint was the unperfected homestead entry of Lewis I. Freeland, and said Rayford extracted or caused to be extracted the gum from trees on said homestead and manufactured the same into spirits of turpentine and rosin; if you further believe that Rayford delivered and said turpentine and rosin to the defendants and the defendants converted the same to its own use, or exercised acts of ownership or dominion over it, such as by appropriating it to the payment of, or a credit upon, any indebtedness due them by said Rayford, or by a sale of such produce by the defendants, that is, a sale by them of the turpentine and rosin received from Rayford if it came from this particular gum—that would be a conversion; (b) and if you find that to be so, then you should find for the plaintiffs for the market value of such spirits of turpentine and rosin at the time that the same was delivered to the defendants, with interest thereon from that time to this day.

I will repeat that. (a) If you believe from the evidence that Rayford knew, or had notice that the land described in the complaint was the unperfected homestead entry of said Freeland, and that Rayford extracted or caused to be extracted crude gum from trees on said homestead, and manu-

factured the same into spirits of turpentine and rosin, and if you further believe from the evidence that Rayford delivered said turpentine and rosin to the defendants, or caused it to be delivered to defendants, and defendants converted same to its own use, or exercised acts of ownership or dominion over it, as in either manner I have explained to you, then you should find for the plaintiff for the market value of said spirits of turpentine and rosin at the time same was delivered to defendants, with interest thereon from that time to this date. The defendants would be liable for such market value, although they were innocent purchasers, that is, purchasers without knowledge or notice that the turpentine and rosin was made from gum which came from said homestead.

(c) The boxing of trees by a settler on public land covered by an unperfected homestead entry, or by any person who knew it was public land, (which an unperfected homestead entry is), and the extracting of crude turpentine therefrom, constitutes in law an intentional, wilful trespass, although he may have acted without knowledge of the illegality of the act; and from such persons the United States are entitled to recover the value of the product manufactured from such crude turpentine by the settler or from any person into whose possession the same may have passed.

The United States were not divested of their title to any turpentine and rosin made from crude that came from the land in question by its sale and delivery to the defendants. The defendants acquired no better title than Rayford had; and if you find from the evidence that there was an appropriation of it by defendants to its own use, there was a conversion, (d) and in such case no demand could be made or was required from Rayford to the defendants, and no demand, therefore, would be required, or necessary, to be made by the United States of Rayford's purchasers, or of him who held the title under and from Rayford, before suit was brought.

If you believe from the evidence, that the defendants received turpentine and rosin which was manufactured from crude gum which came from trees growing on the land described, as claimed in the complaint, you will ascertain from the evidence how much of said turpentine and rosin the defendants did so receive. This is necessary in order to enable you

to ascertain its value and to assess the damages which the plaintiffs would be entitled to recover.

There is both positive and circumstantial evidence in this case, the weight and sufficiency of which you are the judges, and on which you are to decide the issues in the case. In conscientiously endeavoring to ascertain the quantity of spirits of turpentine and rosin received by the defendants from the land in question you should give fair and full consideration to the evidence, both direct and circumstantial in the case, as testified to by the witnesses and shown by the documents in the case. In doing so, you are authorized to draw all fair and reasonable inferences justified by the evidence. You have the right to indulge in every fair and reasonable inference to favor of the plaintiffs, justified by the evidence. The court has said that the evidence is in many respects circumstantial. It is your duty to consider that evidence in connection with all the other evidence in the case and to give it such weight as in your judgment it is entitled to.

(c) The plaintiffs contend that the fact that Rayford had a contract with the defendants to deliver to it all the turpentine and rosin manufactured, or otherwise obtained by him during the time covered by the contract, and the fact that Rayford during that time, at least the years 1904 and 1905, worked the said homestead or a part of it and obtained crude gum therefrom to manufacture turpentine and rosin, and caused to be hauled or did haul any of this crude gum from said homestead to, or in the direction of, the still operated by Rayford, and that spirits of turpentine and rosin were manufactured at that still, and all of it was shipped to the defendants at Mobile, and the bills of lading were sent by Rayford to the defendants of such shipments, and a large amount of turpentine and rosin was received by the defendants from Rayford during the season said land was worked by him, (I believe that is shown by the paper furnished by the defendants), and that accounts of sales were furnished to Rayford showing the amount of proceeds and the disposition of the same, to some extent at least, it not being fully shown by the evidence as to the disposition; and they further contend that the fact that there is evidence showing or tending to show that Rayford shipped to no one else during that time—plaintiffs contend that all these facts and circumstances should be considered by you in determining whether

or not the defendants received the turpentine and rosin manufactured by Rayford from gum obtained from said land; and they further contend that these facts and circumstances are established by the evidence in the case, and that they are sufficient to reasonably satisfy you that the said turpentine and rosin came into defendants' possession and were converted by it.

The defendants take issue with the plaintiffs as to these contentions and insist that they are wholly insufficient and that you should not give such weight to them as they claim for them.

Now if you find these facts and circumstances have been shown by the evidence in this case, you may properly, and you should, consider them in determining the issues in the case, and give to them such weight as in your judgment is fair and reasonable.

In order for the plaintiffs to recover, you should be reasonably satisfied from the evidence that the turpentine and rosin, or some part thereof, for the conversion of which this suit was brought, were made from the gum taken from trees on the land described in the complaint, and that the same came into the possession of the defendant and was converted by it, as the court has explained what constitutes a conversion.

(f) **If you are so reasonably satisfied, then the plaintiffs are entitled to recover from the defendants the value of such turpentine and rosin at the time it was received by the defendants, with interest thereon to date.**

The whole case resolves itself into two questions. First, was any of the turpentine and rosin, manufactured from crude gum gotten from the land described in the complaint, delivered by Rayford to the defendants? The other is: If so, what was its value when it was so delivered? That value must be found in order that you may be able to award damages that plaintiffs are entitled to, if you find any. You have heard the agreement of counsel, and they will furnish you doubtless with a statement of the value; and in order to fix the value, you must determine what quantity of turpentine and rosin was received on which to calculate the damages the plaintiffs would be entitled to recover.

If you find the quantity that was delivered, but are unable to find the grade or quality delivered, you would be jus-

tified in finding the value of the lowest grade, awarding that value, with interest to date, as damages.

If your verdict is for the plaintiffs, it should be in this form: We, the jury, find the defendant guilty and assess the damages at (the value of the turpentine and rosin at the time it was received by the defendant, with interest on such value), signed by one of your number as foreman, the verdict being for the aggregate amount. If your verdict is for the defendant the form should be: We, the jury, find the defendant not guilty. In either case to be signed by one of your number as foreman.

Before the jury retired the defendant reserved an exception to the portion of the court's oral charge designated by black type and initialed (a).

Before the jury retired the defendant reserved an exception to the portion of the court's oral charge designated by black type and initialed (b).

Before the jury retired the defendant reserved an exception to the portion of the court's oral charge designated by black type and initialed (c).

Before the jury retired the defendant reserved an exception to the portion of the court's oral charge designated by black type and initialed (d).

Before the jury retired the defendant reserved an exception to the portion of the court's oral charge designated by black type and initialed (e).

Before the jury retired the defendant reserved an exception to the portion of the court's oral charge designated by black type and initialed (f).

The court, at the request of the plaintiff, gave to the jury the following charge in writing:

"If the jury are satisfied from the evidence that the defendant corporation received manufactured turpentine and rosin which had been manufactured by Rayfold from crude gum obtained from timber then growing on the land described in the complaint, then in ascertaining the amount of same, they may take into consideration the fact that the wrong of the defendant's vendor, Rayford, in obtaining crude gum from the Freeland homestead and mixing it with other crude gum obtained by him from other land and manufacturing it into turpentine and rosin makes the determination of turpentine and

rosin received by the defendants, which had been so manufactured, from gum obtained from the Freeland homestead, difficult; and the jury may, in order to determine such quantity, make every reasonable inference which may be drawn from and justified by the testimony, in favor of the plaintiffs."

To the giving of this charge the defendant, before the jury retired, duly reserved an exception.

The court, at the request of the plaintiff, gave to the jury the following charge in writing:

"The court charges the jury that if they believe from the evidence that the defendants obtained any rosin which had heretofore been manufactured by Rayford from crude gum obtained from the Freeland homestead and are unable to determine from the evidence the various grade of rosin so manufactured and the amount of each grade so obtained they may find for the plaintiff for the average grade so obtained if they can ascertain such average grade from the evidence in the case, and if they cannot from the evidence reasonably determine such grade they should find for the plaintiff for the value of the lowest grade of rosin."

To the giving of this charge the defendant, before the jury retired, duly reserved an exception.

The court at the request of the plaintiff, gave to the jury the following charge in writing:

"The court charges the jury that it is not necessary for the plaintiff to establish beyond all reasonable doubt that the defendant obtained any definite amount of turpentine or any definite amount of any grade of rosin.

To the giving of this charge the defendant, before the jury retired, duly reserved an exception.

The court, at the request of the plaintiff, gave to the jury the following charge in writing:

"The court charges the jury that if they believe from the evidence that the defendant obtained any turpentine or rosin which had theretofore been manufactured by Rayford from crude gum obtained from the Freeland homestead, they should endeavor from all the evidence in the case to determine with

reasonable certainty the amount of turpentine and rosin so obtained and the value of same, and in arriving at such amount they are authorized to draw every reasonable inference justified by all of the evidence in the case."

To the giving of this charge the defendant, before the jury retired, duly reserved an exception.

The court, at the request of the plaintiff, gave to the jury the following charge in writing:

"The court charges the jury that if they believe from the evidence that the defendant obtained any turpentine and rosin which had theretofore been manufactured from crude gum obtained from the Freeland homestead, in endeavoring to ascertain the amount of turpentine and rosin so obtained by the defendant, they may draw every reasonable inference justified by the evidence as to the number of turpentine boxes on the land worked by Rayford and the amount of crude gum obtained therefrom, and the amount of manufactured turpentine and resin so manufactured from such crude gum."

To the giving of this charge the defendant, before the jury retired, duly reserved an exception.

The court, at the request of the plaintiff, gave to the jury the following charge in writing:

"The court charges the jury that if they believe that the defendant corporation received and converted and turpentine and rosin from Rayford which had theretofore been manufactured from crude gum obtained from the Freeland homestead, then they should not find a verdict for nominal damages unless they are unable from all the evidence in the case to reasonably satisfy themselves as to the amount of turpentine and rosin so received and the value thereof."

To the giving of this charge the defendant, before the jury retired, duly reserved an exception.

The court at the request of the defendant, gave to the jury the following charges in writing:

"The court charges the jury that if they believe the evidence in this case they ought not to find a verdict for the plaintiff under the second count of the complaint."

"The court charges the jury that their verdict in this case should be based upon the evidence adduced in the case and such inferences as may be reasonably drawn therefrom, and should not be based either wholly or in part upon their imagination or conjecture outside of the evidence."

"The court charges the jury that in order for the plaintiff to recover in this case the evidence should reasonably satisfy the jury that the defendant converted property of the United States, and that some definite amount was so converted and that said property so converted had a definite value."

"The court charges the jury that in order for the plaintiff to recover in this case, the evidence should reasonably satisfy the jury that the defendant converted property of the United States, and that some definite amount was so converted and that said property so converted had a definite value. And if the evidence reasonably satisfied the jury that the defendant did convert property of the United States, but leaves the minds of the jury in such an unsatisfied state concerning the amount thereof, so that the jury cannot conscientiously say upon their oaths under the evidence that the verdict should be for any specific amount, they ought not to find a verdict for the plaintiff for more than one cent."

"The court charges the jury that in order to render a verdict for the plaintiff for more than nominal damages for the conversion of spirits of turpentine and rosin the evidence should reasonably satisfy the jury that the defendant converted a definite amount of spirits of turpentine and rosin, and that same was manufactured from crude gum taken from the lands of the United States described in the complaint, and that said rosin and turpentine had a definite value at the time and place of conversion, which said definite quantity and definite value must be shown by the evidence, or some part of the evidence, to the reasonable satisfaction of the jury."

"The court charges the jury that regardless of any turpentine and rosin that may have been received by the defendant from Rayford other than such as was manufactured from gum taken from government land, the jury should not find a verdict for the plaintiff unless they are reasonably satisfied

from the evidence that the defendant converted the particular turpentine and rosin manufactured from said crude gum so taken from said government land, if they believe from the evidence that said crude turpentine so taken from said government land was manufactured into spirits of turpentine and rosin."

The charges hereinabove set out were all the instructions, either oral or in writing, given by the court to the jury in this case.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that a sale by a tenant in common, to constitute a conversion, must be made in such manner as to authorize the party to whom it is sold to set up an adverse claim to the other tenant in common, or to place the property in such position that the other tenant in common could not enforce his right to the enjoyment of his share of the property as against the purchaser as well as he could enjoy it against the original tenant in common.

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that if a person comes into the rightful possession of property belonging to another, then that other cannot recover for a conversion of the property without showing that he demanded the possession thereof, and that it was refused, or else introducing some evidence to the effect that the person who took possession converted the property to his own use."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the

following charge, tendered in writing by defendant:

"The court charges the jury that, in order to raise a presumption to the effect that the railroad company delivered the turpentine and rosin, that the evidence tends to show was shipped to the Union Naval Stores Company, it would be necessary to prove that this rosin and turpentine was properly consigned to the Union Naval Stores Company at some place where it did business or had an office or agent, and that the freight was prepaid."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that in order that a sale by a tenant in common in personal property should constitute a conversion of his co-tenant's share, something must appear from the evidence beyond the mere fact that the tenant in common made a sale of the property,—that is to say, it must appear that the sale that was made was inconsistent with the rights of the other tenant in common."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that every tenant in common has the right of possession to the whole property and that he has the right to sell his interest therein and to deliver the whole property to the purchaser, and he cannot be charged with a conversion of the property merely because he sells it to a third person, unless it further appears that the sale was made in such manner as to be inconsistent with the right of the other tenant in common."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that before they could be authorized in rendering a verdict for the plaintiff in any particular sum of money, it will be necessary that the jury should be reasonably satisfied from the evidence that that sum of money was not more than the reasonable value of turpentine which the jury can say to their reasonable satisfaction was obtained by the defendant from the homestead in question."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that there is no evidence in this cause as to the value of crude turpentine, and if the jury believe from the evidence that the Union Naval Stores Company obtained the right of possession of the crude turpentine taken from the homestead in question without any knowledge of the fact that it had come from lands of the United States government, but under the bona fide belief that it had been taken from private lands, then the jury cannot find for the plaintiff for more than one cent."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that if they should find a verdict for the plaintiff, and believe from the evidence that the defendant did not know that the property so converted was taken from lands of the United States, and if the jury further believe from the evidence that moneys advanced by the defendant to Rayford were used by Rayford for the purpose of defraying the expense of distilling and transporting the same, the measure of damages would be the value of the crude gum when severed from the trees in the woods at the time and place

when said gum was originally converted by those who took it from government lands, and not the value after being transported or after being manufactured into more valuable product."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that no one is bound to assume in ordinary commercial transactions that a party with whom he deals is a wrong-doer, and if such party with whom he deals presents property for sale, the title to which is apparently valid, and there are no circumstances disclosed or known by the purchaser which casts suspicion upon the title of the seller, he may rightfully deal with such seller, and if he pay full value of the same acquire the rights of a purchaser in good faith."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that for the plaintiff to recover in this case the evidence should reasonably satisfy the jury that the defendant converted the property described in the complaint, and that the same belonged to the United States of America when the same was so converted."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that there is no evidence in this case that the defendant converted any crude turpentine taken from the lands of the plaintiff."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that there is no evidence in this case that any definite quantity of turpentine or rosin manufactured from crude gum taken from lands belonging to the United States ever came into the possession of the defendant."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that it is the law that one who enters into an ordinary and reasonable contract for the purchase of property from another need not presume that the seller is a wrong-doer, nor must he make a search inquiring as to the validity of the seller's claim to the property."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that in order to find a verdict for the plaintiff for the conversion of crude turpentine for more than nominal damages, the evidence should reasonably satisfy the jury that a definite amount of crude gum taken from lands of the United States, described in the complaint, was converted by the defendant, and that the same had a definite value at the time of the conversion."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that it is the law that if a trespasser takes turpentine or other property from lands of the United States, he is liable to the United States for the value thereof, either in its original shape or in any shape into which same may be manufactured while in his possession. The same rule applies to the purchaser of said property, whether such purchaser be innocent or have knowledge of the fact that said property was taken from lands of the United States. But said rule applies only to the first purchaser, and does not apply to the sub-purchaser in good faith from one who was innocent of the knowledge that it came from government property."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that if they believe the evidence in this case, they ought not to find a verdict for the plaintiff under the first count of the complaint."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that if in the opinion of the jury the evidence in this case is so indefinite that it does not reasonably satisfy the jury that any definite quantity of spirits of turpentine or rosin manufactured from said crude gum so taken from government land was converted by the defendant company, the jury ought not to find a verdict for more than nominal damages in this case, even if they should find a verdict for the plaintiff at all."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant

then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that if they believe the evidence in this case, they ought to find a verdict for the defendant."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that there is no evidence in this cause as to where the turpentine and rosin, that was spoken of in the evidence as having been shipped to the Union Naval Stores Company, was consigned; that is to say that there is no evidence as to the place that it was shipped, nor is there any evidence tending to show that the freight was prepaid, nor is there any evidence tending to show that the Union Naval Stores Company did business at the place to which said rosin and turpentine were shipped, or that they had any agent at that place; and the court further charges the jury that the rule which authorizes the presumption of delivery from the fact of shipment, has no application without evidence that the goods were properly consigned to the Union Naval Stores Company at a place where it did business or had an agent, and that the freights were prepaid."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that no presumption of law, to the effect that goods are delivered by railroad company to the consignee, arises from the fact that such goods were shipped to the consignee over a railroad."

The court refused to give the same to the jury and marked

the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that there is no evidence in this case tending to show that the railroad company delivered to the Union Naval Stores Company any of the rosin and turpentine referred to in the evidence."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that while it is the law that one who takes crude turpentine from lands of the United States is liable therefor as a trespasser, and that whoever buys the same from him is likewise civilly liable to the United States for conversion thereof; yet that rule has not been applied to a sub-purchaser without knowledge that said property was so taken from government land."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that if they should find a verdict for the plaintiff in this case, and if they believe from the evidence that moneys advanced by the defendant to Rayford were used by him for the purpose of paying the expenses of distilling the crude gum taken from government lands, and for the purpose of shipping same, the measure of damages against this defendant would be the value of the crude turpentine in its original state when originally taken from the trees, and not the value of the manufactured product after it was manufactured or improved by distilling it."

The court refused to give the same to the jury and marked

the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant :

"The court charges the jury that, in order to raise a presumption of delivery of goods by a railroad company to a consignee, the evidence must first establish that the goods were properly consigned to the consignee at a place where the consignee resides or does business or has an agent authorized to receive the same; and if the jury are not reasonably satisfied, from the evidence, as to where the turpentine and rosin that is said to have been shipped to the Union Naval Stores Company, was consigned, or as to whether or not the Union Naval Stores Company had any representative at a point to which it was consigned, then no presumption can arise of the delivery of the goods to the Union Naval Stores Company merely because the evidence will show that it was shipped to them."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant :

"The court charges the jury that where a third person obtained possession of property belonging to two others, and without the knowledge or consent of either of the owners so confuses the two that they cannot be distinguished or identified, then the two owners of the different properties that have been so commingled become tenants in common in the commingled mass, and they both have the right of possession to the whole, and each of them have the right to their proportionate share of the proceeds, but neither of them can hold the other for a conversion of the property without showing that the other either did some act of conversion other than the mere taking possession thereof, or that they demanded of the other their proportion thereof, and that it was refused."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant

then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that under the mortgage from H. M. Rayford & Co. to the Union Naval Stores Company, and the contract of sale between said parties, which has been introduced in evidence, the Union Naval Stores Company had the right to the possession of all the rosin and turpentine which was manufactured by H. M. Rayford & Co. from lands other than those in which the United States government had the title, and if the jury believe from the evidence that H. M. Rayford & Company had obtained crude turpentine from the homestead in question, and obtained other crude turpentine from other lands, and that H. M. Rayford & Company then intermingled the crude turpentine obtained by them from both sources, without the consent of the Union Naval Stores Company, and that the Union Naval Stores Company received the same without knowing that any of the turpentine that came from the homestead entry in question was contained in the stuff which had been shipped to them, and if there is no evidence that the Union Naval Stores Company ever disposed thereof, or that the United States ever made any demand upon the Union Naval Stores Company for its share thereof, then the jury should find for the defendant."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that where two parties own different portions of crude turpentine, and it passes into the possession of a third person, or where one party owns a part of said crude turpentine and the other party has the right of possession of the other portion of said turpentine under a mortgage, and the mortgagor confuses the whole into one mass, without the consent of the owner of either portion, or the owner of one part and the mortgagee of the other, and the said goods are so confused that they cannot thereafter be dis-

tinguished, then either of the owners in the one case, or the owner of one part and the mortgagee of the other, have each the right of possession of the whole, and neither can claim that the other has converted his property simply because he has taken possession of the confused mass, without showing that he has demanded possession of his part and it has been refused him."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that where the property of two persons become so commingled as to be incapable of separation, and this commingling is done either by consent of both, or by accident, or by the action of some third person, without the consent of either, then the two owners become tenants in common, each having the right of possession to the whole and each owning an undivided interest therein in proportion to their respective properties that were so commingled, and under these circumstances neither party can hold the other for a conversion merely because such other takes possession of the whole, but in order to hold the other for a conversion they must go further and prove either that they demanded their share and that it was refused, or that such other had either sold the property or done some other act of conversion, and the mere taking possession of the whole would not constitute such an act of conversion."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that if they believe from the evidence that the Union Naval Stores Co. obtained from H. M. Rayford & Co. the turpentine that was taken by them from the homestead entry in question, but that the Union Naval Stores Co. at the time that it obtained said stuff was ignorant

of the fact that it had been taken from lands belonging to the United States government, but believed in good faith that the same had not been so obtained, then the plaintiff could in no event recover of the defendant more than the value of the turpentine at the time that the Union Naval Stores Company obtained the right of possession thereof as against the said H. M. Rayford & Co., and if the jury believe from the evidence that H. M. Rayford & Co. mixed the crude turpentine which they obtained from the homestead in question with other crude turpentine which they had obtained from other sources, and upon which the Union Naval Stores Co. held a mortgage, and that the said confusion was so made that it was thereafter impossible to distinguish which portion of the commingled mass came from the homestead entry in question, and which had been obtained from other sources, then the plaintiff could in no event recover of the defendant more than the value of the crude turpentine which came from the homestead entry at the time that it was so commingled with the crude turpentine upon which the defendant had a mortgage."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that if they find from the evidence in this case that the Union Naval Stores Company came into the possession of the turpentine which came from the homestead in question only by virtue of receiving rosin and the spirits of turpentine which had been manufactured by H. M. Rayford & Co. out of a commingled mass of crude turpentine which had been taken by H. M. Rayford & Co. partly from the homestead in question and partly from other lands and then commingled together and manufactured into rosin and spirits of turpentine, and if the jury further find that the Union Naval Stores Company held a mortgage and contract of sale from H. M. Rayford & Co., by the terms of which the Union Naval Stores Co. had the right to receive all of the rosin and spirits of turpentine manufactured by H. M. Rayford & Co. from lands other than those belonging to the United State government, and

that the rosin and turpentine manufactured out of the commingled mass was shipped to the Union Naval Stores Co. under this contract and mortgage, then the jury should find for the defendant, unless they are further reasonably satisfied from the evidence that the plaintiff demanded from the Union Naval Stores Co. its proportionate interest in the spirits of turpentine and rosin before the beginning of this suit and that the same was refused, or that the Union Naval Stores Co. sold, or otherwise converted, the rosin and spirits of turpentine which it received from H. M. Rayford & Co., and the court charges the jury that there has been no evidence tending to show that the plaintiff ever made such demand, or that the Union Naval Stores Co. converted the spirits of turpentine and rosin that it received from H. M. Rayford & Co."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that if they find from the evidence that the Union Naval Stores Co. had a contract of sale and mortgage from H. M. Rayford & Co., by virtue of which the title to the crude turpentine gotten by H. M. Rayford & Co. from lands other than those which vested in the government, passed immediately to the Union Naval Stores Co. as soon as the crude turpentine was gotten out, and if they further find from the evidence that H. M. Rayford & Co., without the consent of the Union Naval Stores Co., so intermingled the crude turpentine which they got from the homestead in question with that which they had gotten from other lands, and the title to which had passed to the Union Naval Stores Co., and that this intermingling was so done that it was impossible thereafter to distinguish the turpentine that came from the homestead in question from that which came from other lands in which the government had no title, then after the crude turpentine coming from both sources had been so intermingled the confused mass was held as tenants in common by the Union Naval Stores Co. and the United States government, and either of them had the right to the possession of the whole, but subject to the rights

of the other to its proportionate interest therein, and if the Union Naval Stores Co. obtained possession of such intermingled mass, and it does not appear from the evidence either that the Union Naval Stores Co. ever sold it, or any part of it, or otherwise converted the same, or that the United States ever demanded of the Union Naval Stores Co. its portion thereof, then the United States would not be entitled to recover in this action for a conversion of its share of said property."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

The defendant requested the court to give to the jury the following charge, tendered in writing by defendant:

"The court charges the jury that the mortgage and contract which has been introduced in evidence, gave the Naval Stores Co. the right of possession to the crude turpentine obtained by H. M. Rayford & Co. from lands other than those of the United States government as soon as it was obtained by H. M. Rayford & Co., and if H. M. Rayford & Co. also took other crude turpentine from the homestead in question without the knowledge or consent of the Union Naval Stores Company and so confused it with that upon which the Union Naval Stores Co. had a mortgage, as to make it impossible for of identification or separation, then the Union Naval Stores Co. became entitled to the whole mass of commingled stuff as against H. M. Rayford & Co. as soon as the commingling had been done, and if the Union Naval Stores Co. in good faith took the commingled mass, without knowing that it contained turpentine that had been taken from lands of the United States government, then it could in no event be liable for more than the value of the crude turpentine taken from the homestead at the time that it was commingled with the crude turpentine upon which the Union Naval Stores Co. had a mortgage, and the defendant could not be made liable for this amount without some evidence showing that it, the Union Naval Stores Co., in some manner converted the property after it came into its possession, and the mere taking possession of the commingled mass would not constitute a conversion of the property, unless it was further shown that

the United States government demanded from the Union Naval Stores Co. its interest in the commingled mass and that the same was refused."

The court refused to give the same to the jury and marked the same "Refused," to which action of the court the defendant then and there, before the jury retired, duly reserved an exception.

Wherefore, the foregoing bill of exceptions was duly tendered to and examined by the undersigned presiding judge in said cause, on this the 6th day of April, 1912, being a day of the same regular term at which said trial was had.

Harry T. Toulmin, Judge.

Filed April 6th, 1912.

Richard Jones, Clerk.

ASSIGNMENT OF ERRORS.

In the District Court of the United States for the Southern District of Alabama.

United States, Plaintiff,

vs.

At Law. No. 1336.

Union Naval Stores Company, Defendant.

Now comes the defendant and files the following assignments of error upon which it will rely, upon its prosecution, for its writ of error in the above entitled cause in the United States Circuit Court of Appeals, Fifth Circuit; that is to say:

1. The court erred in overruling the defendant's objection to the admission in evidence of the relinquishment dated October 2nd, 1907, and signed "Lewis I. Freeland," and which purports to have been acknowledged before Fred Hoisington, special agent, G. L. O.

The objection overruled is upon the ground that there was no evidence of the execution of the document, and upon the further ground that it was not signed by the same party whose name appears in the complaint to be the homesteader; the one instrument being signed by "Lewis Freeland," and the other by "Louis Freeland."

2. The court erred in overruling the defendant's objec-

tion to the following question propounded by the plaintiff to the witness Dan F. Britton, viz.:

"Do you know the land that is known in the community as the Freeland homestead?"

This objection was based upon the ground that it did not contain a proper designation of the description of the land.

3. The court erred in overruling the defendant's objection to the admission in evidence of the defendant's admission which began with the words, "Defendant admits that the Union Naval Stores Company obtained from H. M. Rayford & Company from April, 1904, to April, 1905, under the mortgage and contract introduced in evidence," and which terminated with the words, "Defendant further admits that it does not know what lands any of this stuff came from."

The objection so overruled was upon the ground that it is not shown where the turpentine and rosin described came from.

4. The court erred in overruling the defendant's objection to the following question propounded by the plaintiff to the witness Mat Owen, viz.:

"What is the general average of the grades for the first year, taking the average distiller? I wish you would state what grades they would obtain from first year gum."

This objection was based upon the ground that there was no evidence that the distiller was an average distiller, and there was no presumption to that effect.

5. The court erred in overruling the defendant's objection to the following question propounded by the plaintiff, on re-direct examination, to the witness Mat Owen, viz.:

"You spoke about if they mixed gum of various years together, that it would not produce the same grades. Is it customary and usual to mix virgin with any other gum?"

This objection was based upon the ground that it is shown what was done in this case; that is, that all the turpentine that went to the still was put upon the same platform and was intermingled and put in the still, and the stuff that came from different lands was not separated.

6. The court erred in overruling the defendant's objection to the following question propounded, on re-direct examination, to the witness Mat Owen, viz.:

"Is it customary to mix two or three years' gum together?"

This objection was upon the ground that the testimony sought was incompetent, irrelevant, and immaterial, and the defendant was not bound by the custom inquired about.

7. The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (a), and which was as follows:
and which was as follows:

(a) "If you believe from the evidence that Henry Rayford knew, or had notice that the land described in the complaint was the unperfected homestead entry of Lewis I. Freeland, and said Rayford extracted or caused to be extracted the gum from trees on said homestead and manufactured the same into spirits of turpentine and rosin; if you further believe that Rayford delivered the said turpentine and rosin to the defendants and the defendants converted the same to its own use, or exercised acts of ownership or dominion over it, such as by appropriating it to the payment of, or a credit upon, any indebtedness due them by said Rayford, or by a sale of such produce by the defendants, that is, a sale by them of the turpentine and rosin received from Rayford if it came from this particular gum—that would be a conversion;

7 1-2. The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (b), and which was as follows:

(b) "and if you find that to be so, then you should find for the plaintiffs for the market value of such spirits of turpentine and rosin at the time that the same was delivered to the defendants, with interest thereon from that time to this day."

8. The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (a), and which was as follows:

(a) If you believe from the evidence that Rayford knew, or had notice that the land described in the complaint was the unperfected homestead entry of said Freeland, and that Rayford extracted or caused to be extracted crude gum from trees on said homestead, and manufactured the same into spirits of turpentine and rosin, and if you further believe from the evi-

dence that Rayford delivered said turpentine and rosin to the defendants, or caused it to be delivered to defendants, and defendants converted same to its own use, or exercised acts of ownership or dominion over it, as in either manner I have explained to you, then you should find for the plaintiff for the market value of said spirits of turpentine and rosin at the time same was delivered to defendants, with interest thereon from that time to this date.

9. The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (c), and which was as follows:

(c) The boxing of trees by a settler on public land covered by an unperfected homestead entry, or by any person who knew it was public land, (which an unperfected homestead entry is), and the extracting of crude turpentine therefrom, constitutes in law an intentional, wilful trespass, although he may have acted without knowledge of the illegality of the act; and from such persons the United States are entitled to recover the value of the produce manufactured from such crude turpentine by the settler or from any person into whose possession the same may have passed.

10. The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (d), and which was as follows:

(d) and in such case no demand could be made or was required from Rayford to the defendants, and no demand, therefore, would be required, or necessary, to be made by the United States of Rayford's purchasers, or of him who held the title under and from Rayford, before suit was brought.

11. The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (e), and which was as follows:

(e) The plaintiffs contend that the fact that Rayford had a contract with the defendants to deliver to it all the turpentine and rosin manufactured, or otherwise obtained by him during the time covered by the contract, and the fact that Rayford during that time, at least the years 1904 and 1905, worked the said homestead or a part of it and obtained crude gum therefrom to manufacture turpentine and rosin, and caused to be hauled or did haul any of this crude gum from said home-

stead to, or in the direction of, the still operated by Rayford, and that spirits of turpentine and rosin were manufactured at that still, and all of it was shipped to the defendants at Mobile, and the bills of lading were sent by Rayford to the defendants of such shipments, and a large amount of turpentine and rosin was received by the defendants from Rayford during the season said land was worked by him, (I believe that is shown by the paper furnished by the defendants), and that accounts of sales were furnished to Rayford showing the amount of proceeds and the disposition of the same, to some extent at least, it not being fully shown by the evidence as to the disposition; and they further contend that the fact that there is evidence showing or tending to show that Rayford shipped to no one else during that time—plaintiffs contend that all these facts and circumstances should be considered by you in determining whether or not the defendants received the turpentine and rosin manufactured by Rayford from gum obtained from said land; and they further contend that these facts and circumstances are established by the evidence in the case, and that they are sufficient to reasonably satisfy you that the said turpentine and rosin came into defendant's possession and were converted by it.

The defendants take issue with the plaintiffs as to these contentions and insist that they are wholly insufficient and that you should not give such weight to them as they claim for them.

Now, if you find these facts and circumstances have been shown by the evidence in this case, you may properly, and you should, consider them in determining the issues in the case, and give to them such weight as in your judgment is fair and reasonable.

12. The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (f), and which was as follows:

(f) If you are so reasonably satisfied, then the plaintiffs are entitled to recover from the defendants the value of such turpentine and rosin at the time it was received by the defendants, with interest thereon to date.

13. The court erred in giving the following written charge at the request of the plaintiff:

"If the jury are satisfied from the evidence that the defendant corporation received manufactured turpentine and rosin which had been manufactured by Rayford from crude gum obtained from timber then growing on the land described in the complaint, then in ascertaining the amount of same, they may take into consideration the fact that the wrong of the defendant's vendor, Rayford, in obtaining crude gum from the Freeland homestead and mixing it with other crude gum obtained by him from other land and manufacturing it into turpentine and rosin makes the determination of turpentine and rosin received by the defendants, which had been so manufactured, from gum obtained from the Freeland homestead difficult; and the jury may, in order to determine such quantity, make every reasonable inference which may be drawn from and justified by the testimony, in favor of the plaintiff."

14. The court erred in giving the following written charge at the request of the plaintiff:

"The court charges the jury that if they believe from the evidence that the defendants obtained any rosin which had theretofore been manufactured by Rayford from crude gum obtained from the Freeland homestead and are unable to determine from the evidence the various grades of rosin so manufactured and the amount of each grade so obtained, they may find for the plaintiff for the average grade so obtained if they can ascertain such average grade from the evidence in the case, and if they cannot from the evidence reasonably determine such grade they should find for the plaintiff for the value of the lowest grade of rosin."

15. The court erred in giving the following written charge at the request of the plaintiff:

"The court charges the jury that it is not necessary for the plaintiff to establish beyond all reasonable doubt that the defendant obtained any definite amount of turpentine or any definite amount of any grade of rosin."

16. The court erred in giving the following written charge at the request of the plaintiff:

"The court charges the jury that if they believe from the evidence that the defendant obtained any turpentine or rosin which had theretofore been manufactured by Rayford from crude gum obtained from the Freeland homestead, they should

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endeavor from all the evidence in the case to determine with reasonable certainty the amount of turpentine and rosin so obtained and the value of same and in arriving at such amount they are authorized to draw every reasonable inference justified by all of the evidence in the case."

17. The court erred in giving the following written charge at the request of the plaintiff:

"The court charges the jury that if they believe from the evidence that the defendant obtained any turpentine and rosin which had theretofore been manufactured from crude gum obtained from the Freeland homestead, in endeavoring to ascertain the amount of turpentine and rosin so obtained by the defendant, they may draw every reasonable inference justified by the evidence as to the number of turpentine boxes on the land worked by Rayford and the amount of crude gum obtained therefrom, and the amount of manufactured turpentine and rosin so manufactured from such crude gum."

18. The court erred in giving the following written charge at the request of the plaintiff:

"The court charges the jury that if they believe that the defendant corporation received and converted any turpentine and rosin from Rayford which had theretofore been manufactured from crude gum obtained from the Freeland homestead, then they should not find a verdict for nominal damages unless they are unable from all the evidence in the case to reasonably satisfy themselves as to the amount of turpentine and rosin so received and the value thereof."

19. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that a sale by a tenant in common, to constitute a conversion, must be made in such manner as to authorize the party to whom it is sold to set up an adverse claim to the other tenant in common, or to place the property in such position that the other tenant in common could not enforce his right to the enjoyment of his share of the property as against the purchaser as well as he could enjoy it against the original tenant in common."

20. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that if a person comes into the rightful possession of property belonging to another, then that other cannot recover for a conversion of the property without showing that he demanded the possession thereof, and that it was refused, or else introducing some evidence to the effect that the person who took possession converted the property to his own use."

21. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that, in order to raise a presumption to the effect that the railroad company delivered the turpentine and rosin, that the evidence tends to show was shipped to the Union Naval Stores Company, it would be necessary to prove that this rosin and turpentine was properly consigned to the Union Naval Stores Company at some place where it did business or had an office or agent, and that the freight was prepaid."

22. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that in order that a sale by a tenant in common in personal property should constitute a conversion of his co-tenant's share, something must appear from the evidence beyond the mere fact that the tenant in common made a sale of the property,—that is to say, it must appear that the sale that was made was inconsistent with the rights of the other tenant in common."

23. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that every tenant in common has the right of possession to the whole property and that he has the right to sell his interest therein and to deliver the whole property to the purchaser, and he cannot be charged with a conversion of the property merely because he sells it to a third person, unless it further appears that the sale was made in such manner as to be inconsistent with the right of the other tenant in common."

24. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that before they could be au-

thorized in rendering a verdict for the plaintiff in any particular sum of money, it will be necessary that the jury should be reasonably satisfied from the evidence that that sum of money was not more than the reasonable value of turpentine which the jury can say to their reasonable satisfaction was obtained by the defendant from the homestead in question."

25. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that there is no evidence in this cause as to the value of crude turpentine, and if the jury believe from the evidence that the Union Naval Stores Company obtained the right of possession of the crude turpentine taken from the homestead in question without any knowledge of the fact that it had come from lands of the United States government, but under the bona fide belief that it had been taken from private lands, then the jury cannot find for the plaintiff for more than one cent."

26. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that if they should find a verdict for the plaintiff, and believe from the evidence that the defendant did not know that the property so converted was taken from lands of the United States, and if the jury further believe from the evidence that moneys advanced by the defendant to Rayford were used by Rayford for the purpose of defraying the expense of distilling and transporting the same, the measure of damages would be the value of the crude gum when severed from the trees in the woods at the time and place when said gum was originally converted by those who took it from government lands, and not the value after being transported or after being manufactured into more valuable product."

27. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that no one is bound to assume, in ordinary commercial transactions, that a party with whom he deals is a wrong-doer, and if such party with whom he deals presents property for sale, the title to which is apparently valid, and there are no circumstances disclosed or known by the purchaser which casts suspicion upon the title

of the seller, he may rightfully deal with such seller, and if he pay full value of the same, acquire the rights of a purchaser in good faith."

28. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that for the plaintiff to recover in this case the evidence should reasonably satisfy the jury that the defendant converted the property described in the complaint, and that the same belonged to the United States of America when the same was converted."

29. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that there is no evidence in this case that the defendant converted any crude turpentine taken from the lands of the plaintiff."

30. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that there is no evidence in this case that any definite quantity of turpentine or rosin manufactured from crude gum taken from the lands belonging to the United States ever came into the possession of the defendant."

31. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that it is the law that one who enters into an ordinary and reasonable contract for the purchase of property from another need not presume that the seller is a wrong-doer, nor must he make a search inquiring as to the validity of the seller's claim to the property."

32. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that in order to find a verdict for the plaintiff for the conversion of crude turpentine for more than nominal damages, the evidence should reasonably satisfy the jury that a definite amount of crude gum taken from lands of the United States, described in the complaint, was converted by the defendant and that the same had a definite value at the time of the conversion."

33. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that it is the law that if a trespasser takes turpentine or other property from lands of the United States, he is liable to the United States for the value thereof, either in its original shape or in any shape into which same may be manufactured while in his possession. The same rule applies to the purchaser of said property, whether such purchaser be innocent or have knowledge of the fact that said property was taken from lands of the United States. But said rule applies only to the first purchaser and does not apply to the sub-purchaser in good faith from one who was innocent of the knowledge that it came from government property."

34. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that if they believe the evidence in this case, they ought not to find a verdict for the plaintiff under the first count of the complaint."

35. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that if in the opinion of the jury the evidence in this case is so indefinite that it does not reasonably satisfy the jury that any definite quantity of spirits of turpentine or rosin manufactured from said crude gum so taken from government land was converted by the defendant company, the jury ought not to find a verdict for more than nominal damages in this case, even if they should find a verdict for the plaintiff at all."

36. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that if they believe the evidence in this case, they ought to find a verdict for the defendant."

37. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that there is no evidence in this cause as to where the turpentine and rosin, that was spoken of in the evidence as having been shipped to the Union Naval Stores Company, was consigned; that is to say, that

there is no evidence as to the place that it was shipped, nor is there any evidence tending to show that the freight was prepaid, nor is there any evidence tending to show that the Union Naval Stores Company did business at the place to which said rosin and turpentine were shipped, or that they had any agent at that place; and the court further charges the jury that the rule which authorizes the presumption of delivery from the fact of shipment, has no application without evidence that the goods were properly consigned to the Union Naval Stores Company at a place where it did business or had an agent, and that the freights were prepaid."

38. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that no presumption of law, to the effect that goods are delivered by railroad company to the consignee, arises from the fact that such goods were shipped to the consignee over a railroad."

39. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that there is no evidence in this case tending to show that the railroad company delivered to the Union Naval Stores Company any of the rosin and turpentine referred to in the evidence."

40. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that while it is the law that one who takes crude turpentine from lands of the United States is liable therefor as a trespasser, and that whoever buys the same from him is likewise civilly liable to the United States for conversion thereof; yet that rule has not been applied to a sub-purchaser without knowledge that said property was so taken from government land."

41. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that if they should find a verdict for the plaintiff in this case, and if they believe from the evidence that moneys advanced by the defendant to Rayford were used by him for the purpose of paying the expenses of distilling the crude gum taken from government lands, and for

the purpose of shipping same, the measure of damages against this defendant would be the value of the crude turpentine in its original state when originally taken from the trees and not the value of the manufactured product after it was manufactured or improved by distilling it."

42. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that, in order to raise a presumption of delivery of goods by a railroad company to a consignee, the evidence must first establish that the goods were properly consigned to the consignee at a place where the consignee resides or does business or has an agent authorized to receive the same; and if the jury are not reasonably satisfied, from the evidence as to where the turpentine and rosin that is said to have been shipped to the Union Naval Stores Company, was consigned, or as to whether or not the Union Naval Stores Company had any representative at a point to which it was consigned, then no presumption can arise of the delivery of the goods to the Union Naval Stores Company merely because the evidence will show that it was shipped to them."

43. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that where a third person obtained possession of property belonging to two others, and without the knowledge or consent of either of the owners so confuses the two that they cannot be distinguished or identified, then the two owners of the different properties that have been so commingled become tenants in common in the commingled mass, and they both have the right of possession to the whole, and each of them have the right to their proportionate share of the proceeds, but neither of them can hold the other for a conversion of the property without showing that the other either did some act of conversion other than the mere taking possession thereof, or that they demanded of the other their proportion thereof and that it was refused."

44. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that under the mortgage from H. M. Rayford & Co. to the Union Naval Stores Company, and the contract of sale between said parties, which has been in-

troduced in evidence, the Union Naval Stores Company had the right to the possession of all the rosin and turpentine which was manufactured by H. M. Rayford & Co. from lands other than those in which the United States government had the title, and if the jury believe from the evidence that H. M. Rayford & Company had obtained crude turpentine from the homestead in question, and obtained other crude turpentine from other lands, and that H. M. Rayford & Company then intermingled the crude turpentine obtained by them from both sources, without the consent of the Union Naval Stores Company, and then shipped the manufactured product to the Union Naval Stores Company, and that the Union Naval Stores Company received the same without knowing that any of the turpentine that came from the homestead entry in question was contained in the stuff which had been shipped to them, and if there is no evidence that the Union Naval Stores Company ever disposed thereof, or that the United States ever made any demand upon the Union Naval Stores Company for its share thereof, then the jury should find for the defendant."

45. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that where two parties own different portions of crude turpentine, and it passes into the possession of a third person, or where one party owns a part of said crude turpentine and the other party has the right of possession of the other portion of said turpentine under a mortgage, and the mortgager confuses the whole into one mass, without the consent of the owner of either portion, or the owner of one part and the mortgagee of the other, and the said goods are so confused that they cannot thereafter be distinguished, then either of the owners in the one case, or the owner of one part and the mortgagee of the other, have each the right of possession of the whole, and neither can claim that the other has converted his property simply because he has taken possession of the confused mass, without showing that he has demanded possession of his part and it has been refused to him."

46. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that where the property of

two persons become so commingled as to be incapable of separation, and this commingling is done either by the consent of both, or by accident, or by the action of some third person, without the consent of either. When the two owners become tenants in common, each has the right of possession to the whole and each owning an undivided interest therein in proportion to their respective properties that were so commingled, and under these circumstances neither party can hold the other for a conversion merely because such other takes possession of the whole, but in order to hold the other for a conversion they must go further and prove either that they demanded their share and that it was refused, or that such other had either sold the property or done some other act of conversion, and the mere taking of the possession of the whole would not constitute such an act of conversion."

47. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that if they believe from the evidence that the Union Naval Stores Company obtained from H. M. Rayford & Co. the turpentine that was taken by them from the homestead entry in question, but that the Union Naval Stores Co. at the time that it obtained said stuff was ignorant of the fact that it had been taken from lands belonging to the United States government, but believed in good faith that the same had not been so obtained, then the plaintiff could in no event recover of the defendant more than the value of the turpentine at the time that the Union Naval Stores Company obtained the right of possession thereof as against the said H. M. Rayford & Co., and if the jury believe from the evidence that H. M. Rayford & Co. mixed the crude turpentine which they obtained from the homestead in question with other crude turpentine which they had obtained from other sources, and upon which the Union Naval Stores Co. held a mortgage, and that the said confusion was so made that it was thereafter impossible to distinguish which portion of the commingled mass came from the homestead entry in question, and which had been obtained from other sources, then the plaintiff could in no event recover of the defendant more than the value of the crude turpentine which came from the homestead entry at the time that it was so commingled with the crude turpentine upon which the defendant had a mortgage."

48. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that if they find from the evidence in this case that the Union Naval Stores Co. came into the possession of the turpentine which came from the homestead in question only by virtue of receiving rosin and the spirits of turpentine which had been manufactured by H. M. Rayford & Company out of a commingled mass of crude turpentine which had been taken by H. M. Rayford & Co. partly from the homestead in question and partly from other lands and then commingled together and manufactured into rosin and spirits of turpentine, and if the jury further find that the Union Naval Stores Company held a mortgage and contract of sale from H. M. Rayford & Company, by the terms of which the Union Naval Stores Co. had the right to receive all of the rosin and spirits of turpentine manufactured by H. M. Rayford & Co. from lands other than those belonging to the United States government, and that the rosin and turpentine manufactured out of the commingled mass was shipped to the Union Naval Stores Co. under this contract and mortgage, then the jury should find for the defendant, unless they are further reasonably satisfied from the evidence that the plaintiff demanded from the Union Naval Stores Co. its proportionate interest in the spirits of turpentine and rosin before the beginning of this suit and that the same was refused, or that the Union Naval Stores Co. sold, or otherwise converted, the rosin and spirits of turpentine which it received from H. M. Rayford & Co., and the court charges the jury that there has been no evidence tending to show that the plaintiff ever made such demand, or that the Union Naval Stores Co. converted the spirits of turpentine and rosin that it received from H. M. Rayford & Co."

49. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that if they find from the evidence that the Union Naval Stores Co. had a contract of sale and mortgage from H. M. Rayford & Co., by virtue of which the title to the crude turpentine gotten by H. M. Rayford & Co. from lands other than those which vested in the government, passed immediately to the Union Naval Stores Co. as soon as the crude turpentine was gotten out, and if they

further find from the evidence that H. M. Rayford & Co., without the consent of the Union Naval Stores Co., so intermingled the crude turpentine which they got from the homestead in question with that which they had gotten from other lands, and the title to which had passed to the Union Naval Stores Co., and that this intermingling was so done that it was impossible thereafter to distinguish the turpentine that came from the homestead in question from that which came from other lands in which the government had no title, then after the crude turpentine coming from both sources had been so intermingled the confused mass was held as tenants in common by the Union Naval Stores Co. and the United States government, and either of them had the right to the possession of the whole, but subject to the rights of the other to its proportionate interest therein, and if the Union Naval Stores Co. obtained possession of such intermingled mass, and it does not appear from the evidence either that the Union Naval Stores Co. ever sold it, or any part of it, or otherwise converted the same, or that the United States ever demanded of the Union Naval Stores Co. its portion thereof, then the United States would not be entitled to recover in this action for a conversion of its share of said property."

50. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that the mortgage and contract which has been introduced in evidence, gave the Naval Stores Co. the right of possession to the crude turpentine obtained by H. M. Rayford & Co. from lands other than those of the United States government as soon as it was obtained by H. M. Rayford & Co., and if H. M. Rayford & Co. also took other crude turpentine from the homestead in question without the knowledge or consent of the Union Naval Stores Company and so confused it with that upon which the Union Naval Stores Co. had a mortgage, as to make it impossible of identification or separation, then the Union Naval Stores Co. became entitled to the whole mass of commingled stuff as against H. M. Rayford & Co. as soon as the commingling had been done, and if the Union Naval Stores Co. in good faith took the commingled mass, without knowing that it contained turpentine that had been taken from lands of the United States government, then it could in no event be liable for more than the value of the

crude turpentine taken from the homestead at the time that it was commingled with the crude turpentine upon which the Union Naval Stores Co. had a mortgage, and the defendant could not be made liable for this amount without some evidence showing that it, the Union Naval Stores Co., in some manner converted the property after it came into its possession, and the mere taking possession of the commingled mass would not constitute a conversion of the property, unless it was further shown that the United States government demanded from the Union Naval Stores Co. its interest in the commingled mass and that the same was refused."

R. W. Stoutz,

Gregory L. & H. T. Smith,

Attorneys for Defendant.

Filed June 10, 1912.

Richard Jones, Clerk.

PETITION FOR WRIT OF ERROR.

United States, Plaintiff,

vs.

No. 1336.

Union Naval Stores Company, Defendant.

In the District Court of the United States for the Southern
District of Alabama.

The Union Naval Stores Company, defendant in the above entitled cause, feeling itself aggrieved by the verdict of the jury, and the judgment entered on the 19th day of December, 1911, comes now by R. W. Stoutz and Gregory L. & H. T. Smith, its attorneys, and petitions said court for an order allowing said defendant to prosecute a writ of error to the honorable the United States Circuit Court of Appeals for the Fifth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court shall be suspended and stayed until the determination of said

writ or error by the United States Circuit Court of Appeals
for the Fifth Circuit.

And your petitioner will ever pray.

R. W. Stoutz,

Gregory L. & H. T. Smith,

Attorneys for Defendant.

Filed June 10, 1912.

Richard Jones, Clerk.

ORDER ALLOWING WRIT OF ERROR.

United States,

vs.

No. 1336.

Union Naval Stores Company.

Upon motion of R. W. Stoutz and Gregory L. & H. T. Smith, attorneys for the defendant, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Fifth Circuit the judgment heretofore entered herein, and that the amount of bond on said writ of error be, and hereby is, fixed at fifty-five hundred dollars (\$5,500.00).

June 10th, A. D. 1912.

Harry T. Toulmin, Judge.

Filed and entered June 10, 1912.

Richard Jones, Clerk.

BOND UNDER WRIT OF ERROR.

United States District Court for the Southern District of
Alabama.

United States,

vs.

No. 1336.

Union Naval Stores Company.

Know all men by these presents: that we, Union Naval Stores Company, a corporation, as principal, and the **American Bonding Company of Baltimore**, as surety, are held and firmly bound unto the United States, plaintiff above named, in the

sum of fifty-five hundred dollars \$(5,500.00) to be paid to the said United States, which payment well and truly to be made we bind ourselves, and each of us jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 13th day of June, A. D. 1912.

Whereas, the above named defendant, Union Naval Stores Company, has sued out a writ of error to the United States Circuit Court of Appeals for the Fifth Circuit to reverse the judgment in the above entitled cause by the District Court of the United States for the Southern District of Alabama.

Now, therefore, the condition of this obligation is such that if the above named Union Naval Stores Company shall prosecute said writ to effect and answer all costs and damages if it should fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

Union Naval stores Co.,

G. F. Mason, Vice President.

By E. Wood, Sec.-Treas.

(Seal.) American Bonding Company of Baltimore,

By W. K. P. Wilson, Local Vice President,

Attest: J. P. Wilson, Local Ass't Secretary.

Approved June 17th, 1912.

Harry T. Toulmin, Judge.

Filed June 17th, 1912.

Richard Jones, Clerk.

WRIT OF ERROR.

United States of America, ss.

The President of the United States to the Honorable the Judge of the District Court of the United States for the Southern District of Alabama:—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of the United States for the Southern District of Alabama, before you, in the common law case No. 1336, wherein The United States of America is plaintiff, and Union Naval

Stores Company, a corporation under the laws of the State of West Virginia, is defendant, a manifest error has happened to the great damage of the said Union Naval Stores Company, as by its complaint appears. We being willing that error, if any has been, should be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United State Circuit Court of Appeals for the Fifth Circuit, so that you have the same in the said Circuit Court of Appeals within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness Honorable Harry T. Toulmin, Judge of the District Court of the United States for the Southern District of Alabama, and the seal of said court affixed at the city of Mobile, Alabama, this 17th day of June, A. D. 1912.

(Seal.) Richard Jones,

Clerk U. S. District Court, Southern Dist. of Ala.

Allowed by

Harry T. Toulmin,

U. S. District Judge, Southern District of Alabama.

Filed June 17, 1912.

Richard Jones, Clerk.

It is ordered that the time for filing the record under this writ of error be and the same is hereby extended thirty days from the time named herein.

David D. Shelby,

U. S. Circuit Judge, Fifth Circuit.

CITATION.

United States of America, ss.

The President of the United States to the United States of America—Greeting:

You are hereby admonished to be and appear in the United States Circuit Court of Appeals for the Fifth Circuit, within

thirty days from the date hereof, pursuant to a writ of error sued out and filed in the clerk's office of the District Court of the United States for the Southern District of Alabama, at Mobile, Alabama, in common law case No. 1336, wherein the United States are plaintiffs in error, and you the said Union Naval Stores Company, a corporation under the laws of the State of West Virginia, is defendant in error, to shew cause, if any there be, why the judgment rendered against the said Union Naval Stores Company as in said writ of error mentioned, should not be corrected, and full and speedy justice should not be done to the parties aforesaid in that behalf.

Witness Honorable Harry T. Toulmin, Judge of the District Court of the United States for the Southern District of Alabama, and the seal of said court affixed at the city of Mobile, Alabama, this 17th day of June A. D. 1912.

Harry T. Toulmin,

U. S. District Judge, Southern District of Alabama.

Attest:

(Seal.) Richard Jones, Clerk.

We hereby accept service of the above citation and acknowledge receipt of a copy thereof this 17th day of June, A. D. 1912.

Wm. H. Armbrecht,

Attorney for defendant in error.

Filed June 17, 1912.

Richard Jones, Clerk.

CERTIFICATE.

United States of America.

District Court of the United States for the Southern District
of Alabama.

I, Richard Jones, Clerk of said Court, do hereby certify that the foregoing 105 pages numbered 1 to 105 contain a true and correct transcript of the record and proceedings had in said court in Common Law Case No. 1336, wherein the United States of America are plaintiffs, and Union Naval Stores Company, a corporation under the laws of the State of West Virginia, is defendant, as fully as the same remain of record and file in my office as such clerk in said case, and that the same constitutes the return to the writ of error sued out in said case by said defendant, which writ is pages 103 and 104 of this transcript.

In Testimony Whereof, I hereto set my hand and affix the seal of said court at the City of Mobile, Alabama, this 12th day of August, A. D. 1912.

(Seal.) Rich'd Jones,
Clerk.

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument in Part and Continuance.

Extract from the Minutes of January 8th, 1913.

No. 2415.

UNION NAVAL STORES COMPANY
versus
THE UNITED STATES.

On this day this cause was regularly called, and, after argument by Richard Wm. Stoutz, Esq., for Plaintiff in Error, and Wm. H. Ambrecht, Esq., Special Assistant to the Attorney General, for Defendant in Error, was continued until tomorrow at eleven o'clock A. M. for further hearing.

Continued Argument and Submission.

Extract from the Minutes of January 9th, 1913.

No. 2415.

UNION NAVAL STORES COMPANY
versus
THE UNITED STATES.

On this day, this cause was called for further hearing, and, after argument by Harry T. Smith, Esq., for Plaintiff in Error, was submitted to the Court.

Opinion of the Court.

Filed February 4th, 1913.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 2415.

UNION NAVAL STORES COMPANY, Plaintiff in Error,
versus

THE UNITED STATES OF AMERICA, Defendant in Error.

Error to the District Court of the United States for the Southern District of Alabama.

Harry T. Smith (R. W. Stoutz, on the brief), for plaintiff in error.
William H. Ambrecht, special assistant to the Attorney General, for defendant in error.

Before Pardee and Shelby, Circuit Judges, and Grubb, District Judge.

GRUBB, *District Judge*, delivers the opinion of the court:

This was an action by the defendant in error, the United States, against the plaintiff in error, defendant in the court below, for

damages for the conversion of certain turpentine and resin, taken in crude form from pine trees on the homestead entry of Lewis Freeland by H. M. Rayford and by him manufactured and sold to the plaintiff in error. There was a judgment in the court below for the market value of turpentine and resin at the time of its sale and delivery to the plaintiff in error, with interest from the date of purchase to the time of trial. There are fifty assignments of error. Upon examination we find none of sufficient merit to justify a reversal of the judgment.

The jury found, and we think were authorized to find from evidence contained in the record, that Rayford was a wilful trespasser, having boxed the pine trees from which the turpentine was taken with knowledge that Freeland, the homesteader, had not completed his entry at the time the trees were boxed. Rayford's contract with the plaintiff in error contained a stipulation that he was not to box trees on uncompleted homesteads, and Freeland, the entryman, at the time Rayford attempted to acquire from him the right to box trees, warned him of the condition of his title and his probable liability to the Government for so doing. In the case of *Parish, et al. v. U. S.*, 184 Fed. 590, we held that, "The boxing of trees by a settler on public land covered by an unperfected homestead entry and the extracting of crude turpentine therefrom constitutes in law a wilful trespass, although the settler may have acted in good faith and without knowledge of the illegality of the act." We adhered to this principle in the case of *McKenzie v. U. S.*, 184 U. S. 988, and see no reason to depart from it now.

The plaintiff in error was therefore a purchaser from a wilful trespasser and, conceding its good faith, was liable for the value of the turpentine and resin at the time of its purchase from Rayford. In *Bolles Woodenware Co. v. U. S.*, 106 U. S., 432, the measure of damages as to an innocent purchaser from a wilful trespasser is thus stated. "Where he is a purchaser without notice of wrong from a wilful trespasser, the value at the time of such purchase." In the case of *U. S. v. Perkins*, 44 Fed. 670, we stated the rule as follows: "In an action by the United States for the value of timber bought by defendant from a trespasser who had knowingly cut it from public land, the measure of damage is the value of the timber at the time of the purchase."

Conversion of the resin and turpentine by an innocent purchaser, if it is not made out, even in the absence of demand, by the taking and retaining possession from one whose possession was in itself wrongful (see *Stubbee v. Trustees, Cincinnati Railway Co.*, 78 Ky. 481, 39 Am. Rep. 251), would be supported by a sale of it before the beginning of the suit, even though no demand had been made on him by the owner (38 Cyc. 2026, 2032-2036). The record contains evidence which justified the submission to the jury of the question as to whether the plaintiff in error had sold the resin and turpentine before the Government's suit was instituted.

The doctrine of accession has no just application to the facts in this case. The record shows that evidence was submitted to the jury from which they could have determined with reasonable certainty

the amount of turpentine and resin that came from the Freeland entry, as distinguished from the mass delivered by Rayford to plaintiff in error. If it were indeterminable the result contended for by plaintiff in error would not have followed. The confusion was the act of Rayford, who was a wilful wrongdoer, and the result of confusion in such a case, if separation were impossible, would be that the title to the whole mass which Rayford delivered to the plaintiff in error would have been vested in the Government. The plaintiff in error, in being charged only with what the jury found to have been taken from the Freeland entry, has no cause of complaint.

Interest was assessed, as part of the damages, from the time of the purchase by plaintiff in error till the time of the trial. No demand is shown to have been made by the Government upon the plaintiff in error prior to the bringing of the suit. The plaintiff in error was an innocent purchaser, though from a wilful trespasser. Under the circumstances, we think interest should only begin to run from the date of demand, which in this case was the commencement of the Government's suit. In the case of *U. S. v. Perkins, et al.*, 44 Fed. 670-676, we held in a similar case that interest should be computed only from the date of judicial demand.

We direct that a remittitur be entered upon the judgment in the amount of that part of the interest included in it, computed from the time of the purchase of the turpentine and resin by the plaintiff in error up to the date of the filing of the suit, and that the judgment be, thereupon, affirmed with costs.

Judgment.

Extract from the Minutes of February 4th, 1913.

No. 2415.

UNION NAVAL STORES COMPANY
versus
THE UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Alabama, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that a remittitur be entered upon the judgment of the said District Court in this cause, in the amount of that part of the interest included in it, computed from the time of the purchase of the turpentine and resin by the plaintiff in error up to the date of the filing of the suit, and that the judgment be, thereupon, affirmed.

Petition and Order for Writ of Error.

Filed January 29th, 1914.

United States Circuit Court of Appeals for the Fifth Circuit.

No. 2415.

UNION NAVAL STORES COMPANY, a Corporation, Plaintiff in Error,
 vs.
 UNITED STATES OF AMERICA, Defendant in Error.

Petition for Writ of Error.

Your petitioner, Union Naval Stores Company, a corporation, plaintiff in error in the above entitled cause, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Fifth Circuit and that a judgment was therein rendered on the 4th day of February, 1913, affirming a judgment of the District Court of the United States for the Southern District of Alabama; which latter judgment was rendered on December 19, 1911, for Twenty-four Hundred Forty-seven Dollars and Fifty-five cents (\$2,447.55) and costs of suit; that said judgment of said United States Circuit Court of Appeals for the Fifth Circuit ordered a remittitur to be entered upon said judgment so affirmed thereby of a certain part of the interest included therein, and that said remittitur was entered on April 24, 1913, in the sum of Seven Hundred Forty-seven Dollars and Eighty-six Cents (\$747.86) and filed in the District Court of the United States for the Southern District of Alabama, leaving the net amount of said judgment so affirmed the sum of Sixteen Hundred Ninety-nine Dollars and Sixty-nine Cents (\$1,699.69) besides costs of suit; that even after the entering of said remittitur the matter in controversy in said suit so affirmed by said judgment exceeds One Thousand Dollars besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different states, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and therefore your petitioner respectfully prays that writ of error be allowed to it in the above entitled cause directing the clerk of the United States Circuit Court of Appeals for the Fifth Circuit to send the record and proceedings in said cause with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

(Signed) UNION NAVAL STORES COMPANY.

*Plaintiff in Error,*By RICHARD WM. STOUTZ, *Its Attorney.*

The foregoing petition is granted and writ of error allowed as prayed for upon plaintiff in error giving bond according to law in the sum of \$500.00.

(Signed)

DON A. PARDEE,
Circuit Judge.

Assignments of Error.

Filed January 29th, 1914.

United States Circuit Court of Appeals for the Fifth Circuit.

No. 2415.

UNION NAVAL STORES COMPANY, a Corporation, Plaintiff in Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

Now comes the plaintiff in error, Union Naval Stores Company, by Richard Wm. Stoutz, its attorneys, and says that in the record and proceedings aforesaid of the United States Circuit Court of Appeals for the Fifth Circuit in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of the said plaintiff in error, in this, to-wit:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the Southern District of Alabama which said District Court of the United States for the Southern District of Alabama rendered judgment against the plaintiff in error and in favor of the defendant in error on December 19, 1911, for \$2,447.55 and the costs of the suit, which said judgment was affirmed by said United States Circuit Court of Appeals for the Fifth Circuit with the direction "that a remittitur be entered upon the judgment in the amount of that part of the interest included in it computed from the time of the purchase of the turpentine and rosin by the plaintiff in error up to the date of the filing of the suit and that the judgment be thereupon affirmed with costs," pursuant to which remittitur there was entered in said District Court of the United States for the Southern District of Alabama on April 24, 1913, a remittitur of said interest in the sum of \$747.86 so that after said remittitur was entered said judgment stood for the sum of \$1,699.69 as of the date of December 19, 1911, thus affirmed by said United States Circuit Court of Appeals for the Fifth Circuit.

Second. Said Circuit Court of Appeals erred in not reversing said judgment of the United States District Court for the Southern District of Alabama and in not remanding said cause to said District Court for a new trial.

Third. Said Circuit Court of Appeals erred in not sustaining the Seventh assignment of error upon the record in said cause, which said assignment of error was as follows:

"7. The court erred in giving that portion of its oral charge

which is in black letters and designated with the letter (a), and which was as follows:

(a) 'If you believe from the evidence that Henry Rayford knew, or had notice that the land described in the complaint was the unperfected homestead entry of Lewis I. Freeland, and said Rayford extracted or caused to be extracted the gum from trees on said homestead and manufactured the same into spirits of turpentine and rosin; if you further believe that Rayford delivered the said turpentine and rosin to the defendants and the defendants converted the same to its own use, or exercised acts of ownership or dominion over it, such as by appropriating it to the payment of, or credit upon, any indebtedness due them by said Rayford, or by a sale of such produce by the defendant, that is, a sale by them of the turpentine and rosin received from Rayford if it came from this particular gum—that would be a conversion.' (Rec., p. 62.)"

Fourth. Said Circuit Court of Appeals erred in not sustaining the assignment of error numbered Seven and One-half upon the record in said cause, which said assignment of error was as follows: "7½. The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (b), and which was as follows:

(b) 'and if you find that to be so, then you should find for the plaintiffs for the market value of such spirits of turpentine and rosin at the time that the same was delivered to the defendants, with interest thereon from that time to this day.' (Rec., p. 62.)"

Fifth. Said Circuit Court of Appeals erred in not sustaining the Eighth assignment of error upon the record in said cause, which said assignment of error was as follows:

"8. The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (a), and which was as follows:

(a) 'If you believe from the evidence that Rayford knew, or had notice that the land described in the complaint was the unperfected homestead entry of said Freeland, and that Rayford extracted or caused to be extracted crude gum from trees on said homestead, and manufactured the same into spirits of turpentine and rosin, and if you further believe from the evidence that Rayford delivered said turpentine and rosin to the defendants, or caused it to be delivered to defendants, and defendants converted same to its own use, or exercised acts of ownership or dominion over it, as in either manner I have explained to you, then you should find for the plaintiff for the market value of said spirits of turpentine and rosin at the time same was delivered to defendants, with interest thereon from that time to this date.' (Rec., p. 62-3.)"

Sixth. Said Circuit Court of Appeals erred in not sustaining the Ninth assignment of error upon the record in said cause, which said assignment of error was as follows:

"9. The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (c), and which was as follows:

(c) 'The boxing of trees by a settler on public land covered by an unperfected homestead entry, or by any person who knew it

was public land (which an unperfected homestead entry is), and the extracting of crude turpentine therefrom, constitutes in law an intentional, wilful trespass, although he may have acted without knowledge of the illegality of the act; and from such persons the United States are entitled to recover the value of the produce manufactured from such crude turpentine by the settler or from any person into whose possession the same may have passed.' (Rec., p. 63.)"

Seventh. Said Circuit Court of Appeals erred in not sustaining the Tenth assignment of error upon the record in said cause, which said assignment of error was as follows:

"10. The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (*d*), and which was as follows:

(*d*) 'and in such case no demand could be made or was required from Rayford to the defendants, and no demand, therefore, would be required, or necessary, to be made by the United States of Rayford's purchasers, or of him who held the title under and from Rayford, before suit was brought.' (Rec., p. 63.)"

Eighth. Said Circuit Court of Appeals erred in not sustaining the Eleventh assignment of error upon the record in said cause, which said assignment of error was as follows:

"11. The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (*e*), and which was as follows:

(*e*) 'The plaintiffs contend that the fact that Rayford had a contract with the defendants to deliver to it all the turpentine and rosin manufactured, or otherwise obtained by him during the time covered by the contract, and the fact that Rayford during that time, at least the years 1904 and 1905, worked the said homestead or a part of it and obtained crude gum therefrom to manufacture turpentine and rosin and caused to be hauled or did haul any of this crude gum from said homestead to, or in the direction of, the still operated by Rayford, and that spirits of turpentine and rosin were manufactured at that still, and all of it was shipped to the defendants at Mobile, and the bills of lading were sent by Rayford to the defendants of such shipments, and a large amount of turpentine and rosin was received by the defendants from Rayford during the season said land was worked by him (I believe that is shown by the paper furnished by the defendants), and that accounts of sales were furnished to Rayford showing the amount of proceeds and the disposition of the same, to some extent at least, it not being fully shown by the evidence as to the disposition; and they further contend that the fact that there is evidence showing or tending to show that Rayford shipped to no one else during that time—plaintiffs contend that all these facts and circumstances should be considered by you in determining whether or not the defendants received the turpentine and rosin manufactured by Rayford from gum obtained from said land; and they further contend that these facts and circumstances are established by the evidence in the case, and that they are sufficient to reasonably satisfy you that the said

turpentine and rosin came into defendant's possession and were converted by it.

The defendants take issue with the plaintiffs as to these contentions and insist that they are wholly insufficient and that you should not give such weight to them as they claim for them.

Now, if you find these facts and circumstances have been shown by the evidence in this case, you may properly, and you should, consider them in determining the issues in the case, and give to them such weight as in your judgment is fair and reasonable.' (Rec., pp. 64-5.)"

Ninth. Said Circuit Court of Appeals erred in not sustaining the Twelfth assignment of error upon the record in said cause, which said assignment of error was as follows:

"12. The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (f), and which was as follows:

(f) 'If you are so reasonably satisfied, then the plaintiffs are entitled to recover from the defendants the value of such turpentine and rosin at the time it was received by the defendants, with interest thereon to date.' (Rec., p. 65.)"

Tenth. Said Circuit Court of Appeals erred in not sustaining the Thirteenth assignment of error upon the record in said cause, which said assignment of error was as follows:

"13. The court erred in giving the following written charge at the request of the plaintiff:

'If the jury are satisfied from the evidence that the defendant corporation received manufactured turpentine and rosin which had been manufactured by Rayford from crude gum obtained from timber then growing on the land described in the complaint, then in ascertaining the amount of same, they may take into consideration the fact that the wrong of the defendant's vendor, Rayford, in obtaining crude gum from the Freeland homestead and mixing it with other crude gum obtained by him from other land and manufacturing it into turpentine and rosin makes the determination of turpentine and rosin received by the defendants, which had been so manufactured, from gum obtained from the Freeland homestead difficult; and the jury may, in order to determine such quantity, make every reasonable inference which may be drawn from and justified by the testimony, in favor of the plaintiff.' (Rec., pp. 66-7.)"

Eleventh. Said Circuit Court of Appeals erred in not sustaining the Fourteenth assignment of error upon the record in said cause, which said assignment of error was as follows:

"14. The court erred in giving the following written charge at the request of the plaintiff:

'The court charges the jury that if they believe from the evidence that the defendants obtained any rosin which had theretofore been manufactured by Rayford from crude gum obtained from the Freeland homestead and are unable to determine from the evidence the various grades of rosin so manufactured and the amount of each grade so obtained, they may find for the plaintiff for the average grade so obtained, if they can ascertain such average grade from the

evidence in the case, and if they cannot from the evidence reasonably determine such grade they should find for the plaintiff for the value of the lowest grade of rosin." (Rec., p. 67.)"

Twelfth. Said Circuit Court of Appeals erred in not sustaining the Nineteenth assignment of error upon the record in said cause, which said assignment of error was as follows:

"19. The court erred in refusing the written request of the defendant to charge the jury as follows:

'The court charges the jury that a sale by a tenant in common, to constitute a conversion, must be made in such manner as to authorize the party to whom it is sold to set up an adverse claim to the other tenant in common, or to place the property in such position that the other tenant in common could not enforce his right to the enjoyment of his share of the property as against the purchaser as well as he could enjoy it against the original tenant in common.' (Rec., p. 70.)"

Thirteenth. Said Circuit Court of Appeals erred in not sustaining the Twenty-fifth assignment of error upon the record in said cause, which said assignment of error was as follows:

"25. The court erred in refusing the written request of the defendant to charge the jury as follows:

'The court charges the jury that there is no evidence in this cause as to the value of crude turpentine, and if the jury believe from the evidence that the Union Naval Stores Company obtained the right of possession of the crude turpentine taken from the homestead in question without any knowledge of the fact that it had come from lands of the United States government, but under the bona fide belief that it had been taken from private lands, then the jury cannot find for the plaintiff for more than one cent.' (Rec., p. 72.)"

Fourteenth. Said Circuit Court of Appeals erred in not sustaining the Twenty-sixth assignment of error upon the record in said cause, which said assignment of error was as follows:

"26. The court erred in refusing the written request of the defendant to charge the jury as follows:

'The court charges the jury that if they should find a verdict for the plaintiff, and believe from the evidence that the defendant did not know that the property so converted was taken from lands of the United States, and if the jury further believe from the evidence that moneys advanced by the defendant to Rayford were used by Rayford for the purpose of defraying the expense of distilling and transporting the same, the measure of damages would be the value of the crude gum when severed from the trees in the *in the* woods at the time and place when said gum was originally converted by those who took it from government lands, and not the value after being transported or after being manufactured into more valuable product.' (Rec., pp. 72-73.)"

Fifteenth. Said Circuit Court of Appeals erred in not sustaining the Twenty-seventh assignment of error upon the record in said cause, which said assignment of error was as follows:

"27. The court erred in refusing the written request of the defendant to charge the jury as follows:

'The court charges the jury that no one is bound to assume, in ordinary commercial transactions, that a party with whom he deals is a wrong-doer, and if such party with whom he deals presents property for sale, the title to which is apparently valid, and there are no circumstances disclosed or known by the purchaser which casts suspicion upon the title of the seller, he may rightfully deal with such seller, and if he pay full value of the same, acquire the rights of a purchaser in good faith.' (Rec., p. 73.)"

Sixteenth. Said Circuit Court of Appeals erred in not sustaining the Thirty-first assignment of error upon the record in said cause, which said assignment of error was as follows:

"31. The court erred in refusing the written request of the defendant to charge the jury as follows:

'The court charges the jury that it is the law that one who enters into an ordinary and reasonable contract for the purchase of property from another need not presume that the seller is a wrong-doer, nor must he make a search inquiring as to the validity of the seller's claim to the property.' (Rec., p. 74.)"

Seventeenth. Said Circuit Court of Appeals erred in not sustaining the Thirty-fourth assignment of error upon the record in said cause, which said assignment of error was as follows:

"34. The court erred in refusing the written request of the defendant to charge the jury as follows:

'The court charges the jury that if they believe the evidence in this case, they ought not to find a verdict for the plaintiff under the first count of the complaint.' (Rec., p. 75.)"

Eighteenth. Said Circuit Court of Appeals erred in not sustaining the Thirty-fifth assignment of error upon the record in said cause, which said assignment of error was as follows:

"35. The court erred in refusing the written request of the defendant to charge the jury as follows:

'The court charges the jury that if in the opinion of the jury the evidence in this case is so indefinite that it does not reasonably satisfy the jury that any definite quantity of spirits of turpentine or rosin manufactured from said crude gum so taken from government land was converted by the defendant company, the jury ought not to find a verdict for more than nominal damages in this case, even if they should find a verdict for the plaintiff at all.'

Nineteenth. Said Circuit Court of Appeals erred in not sustaining the Thirty-sixth assignment of error upon the record in said cause, which said assignment of error was as follows:

"36. The court erred in refusing the written request of the defendant to charge the jury as follows:

'The court charges the jury that if they believe the evidence in this case, they ought to find a verdict for the defendant.' (Rec., p. 76.)"

Twentieth. Said Circuit Court of Appeals erred in not sustaining the Forty-first assignment of error upon the record in said cause, which said assignment of error was as follows:

"41. The court erred in refusing the written request of the defendant to charge the jury as follows:

'The court charges the jury that if they should find a verdict

for the plaintiff in this case, and if they believe from the evidence that moneys advanced by the defendant to Rayford were used by him for the purpose of paying the expenses of distilling the crude gum taken from government lands, and for the purpose of shipping the same, the measure of damages against this defendant would be the value of the crude turpentine in its original state when originally taken from the trees and not the value of the manufactured product after it was manufactured or improved by distilling it.' (Rec., p. 77.)"

Twenty-first. Said Circuit Court of Appeals erred in not sustaining the Forty-third assignment of error upon the record in said cause, which said assignment of error was as follows:

"43. The court erred in refusing the written request of the defendant to charge the jury as follows:

'The court charges the jury that where a third person obtained possession of property belonging to two others, and without the knowledge or consent of either of the owners so confuses the two that they cannot be distinguished or identified, then the two owners of the different properties that have been so commingled become tenants in common in the commingled mass, and they both have the right of possession to the whole, and each of them have the right to their proportionate share of the proceeds, but neither of them can hold the other for a conversion of the property without showing that the other either did some act of conversion other than the mere taking possession thereof, or that they demanded of the other their proportion thereof and that it was refused.' (Rec., p. 78.)"

Twenty-second. Said Circuit Court of Appeals erred in not sustaining the Forty-fourth assignment of error upon the record in said cause, which said assignment of error was as follows:

"44. The court erred in refusing the written request of the defendant to charge the jury as follows:

'The court charges the jury that under the mortgage from H. M. Rayford & Co., to the Union Naval Stores Company, and the contract of sale between said parties, which has been introduced in evidence, the Union Naval Stores Company had the right to the possession of all the rosin and turpentine which was manufactured by H. M. Rayford & Co., from lands other than those in which the United States government had the title, and if the jury believe from the evidence that H. M. Rayford & Company had obtained crude turpentine from the homestead in question, and obtained other crude turpentine from other lands, and that H. M. Rayford & Company then intermingled the crude turpentine obtained by them from both sources, without the consent of the Union Naval Stores Company, and then shipped the manufactured product to the Union Naval Stores Company, and that the Union Naval Stores Company received the same without knowing that any of the turpentine that came from the homestead entry in question was contained in the stuff which had been shipped to them, and if there is no evidence that the Union Naval Stores Company ever disposed thereof, or that the United States ever made any demand upon the Union Naval

Stores Company for its share thereof, then the jury should find for the defendant." (Rec., p. 79.)"

Twenty-third. Said Circuit Court of Appeals erred in not sustaining the Forty-fifth assignment of error upon the record in said cause, which said assignment of error was as follows:

"45. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that where two parties own different portions of crude turpentine, and it passes into the possession of a third person, or where one party owns a part of said crude turpentine and the other party has the right of possession of the other portion of said turpentine under a mortgage, and the mortgagor confuses the whole into one mass, without the consent of the owner of either portion, or the owner of one part and the mortgagee of the other, and the said goods are so confused that they cannot thereafter be distinguished, then either of the owners in the one case, or the owner of one part and the mortgagee of the other, have each the right of possession of the whole, and neither can claim that the other has converted his property simply because he has taken possession of the confused mass without showing that he has demanded possession of his part and it has been refused to him." (Rec., p. 79.)"

Twenty-fourth. Said Circuit Court of Appeals erred in not sustaining the Forty-sixth assignment of error upon the record in said cause, which said assignment of error was as follows:

"46. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that where the property of two persons become so commingled as to be incapable of separation, and this commingling is done either by the consent of both, or by accident, or by the action of some third person, without the consent of either, then the two owners become tenants in common, each having the right of possession to the whole and each owning an undivided interest therein in proportion to their respective properties that were so commingled, and under these circumstances neither party can hold the other for a conversion merely because such other takes possession of the whole, but in order to hold the other for a conversion they must go further and prove either that they demanded their share and that it was refused, or that such other had either sold the property or done some other act of conversion, and the mere taking of the possession of the whole would not constitute such an act of conversion." (Rec., p. 80.)"

Twenty-fifth. Said Circuit Court of Appeals erred in not sustaining the Forty-seventh assignment of error upon the record in said cause, which said assignment of error was as follows:

"47. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that if they believe from the evidence that the Union Naval Stores Company obtained from H. M. Rayford & Co., the turpentine that was taken by them from the homestead entry in question, but that the Union Naval Stores Company at the time that it obtained said stuff was ignorant of the

fact that it had been taken from lands belonging to the United States government, but believed in good faith that the same had not been so obtained, then the plaintiff could in no event recover of the defendant more than the value of the turpentine at the time that the Union Naval Stores Company obtained the right of possession thereof as against the said H. M. Rayford & Co., and if the jury believe from the evidence that H. M. Rayford & Co., mixed the crude turpentine which they obtained from the homestead in question with other crude turpentine which they had obtained from other sources, and upon which the Union Naval Stores Co., held a mortgage, and that the said confusion was so made that it was thereafter impossible to distinguish which portion of the commingled mass came from the homestead entry in question, and which had been obtained from other sources, then the plaintiff could in no event recover of the defendant more than the value of the crude turpentine which came from the homestead entry at the time that it was so commingled with the crude turpentine upon which the defendant had a mortgage.' (Rec., pp. 80-81.)"

Twenty-sixth. Said Circuit Court of Appeals erred in not sustaining the Forty-eighth assignment of error upon the record in said cause, which assignment of error was as follows:

"48. The court erred in refusing the written request of the defendant to charge the jury as follows:

'The court charges the jury that if they find from the evidence in this case that the Union Naval Stores Co., came into the possession of the turpentine which came from the homestead in question only by virtue of receiving rosin and the spirits of turpentine which had been manufactured by H. M. Rayford & Company out of a commingled mass of crude turpentine which had been taken by H. M. Rayford & Co., partly from the homestead in question and partly from other lands and then commingled together and manufactured into rosin and spirits of turpentine, and if the jury further find that the Union Naval Stores Company held a mortgage and contract of sale from H. M. Rayford & Company, by the terms of which the Union Naval Stores Co., had the right to receive all of the rosin and spirits of turpentine manufactured by H. M. Rayford & Co., from lands other than those belonging to the United States government, and that the rosin and turpentine manufactured out of the commingled mass was shipped to the Union Naval Stores Co., under this contract and mortgage, then the jury should find for the defendant, unless they are further reasonably satisfied from the evidence that the plaintiff demanded from the Union Naval Stores Co., its proportionate interest in the spirits of turpentine and rosin before the beginning of this suit and that the same was refused, or that the Union Naval Stores Co., sold, or otherwise converted, the rosin and spirits of turpentine which it received from H. M. Rayford & Co., and the court charges the jury that there has been no evidence tending to show that the plaintiff ever made such demand, or that the Union Naval Stores Co., converted the spirits of turpentine and rosin that it received from H. M. Rayford & Co.' (Rec., pp. 81-82.)"

Twenty-seventh. Said Circuit Court of Appeals erred in not sustaining the Forty-ninth assignment of error upon the record in said cause, which said assignment of error was as follows:

"49. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that if they find from the evidence that the Union Naval Stores Co., had a contract of sale and mortgage from H. M. Rayford & Co., by virtue of which the title to the crude turpentine gotten by H. M. Rayford & Co., from lands other than those which vested in the government, passed immediately to the Union Naval Stores Co., as soon as the crude turpentine was gotten out, and if they further find from the evidence that H. M. Rayford & Co., without the consent of the Union Naval Stores Co., so intermingled the crude turpentine which they got from the homestead in question with that which they had gotten from other lands, and the title to which had passed to the Union Naval Stores Co., and that this intermingling was so done that it was impossible thereafter to distinguish the turpentine that came from the homestead in question from that which came from other lands in which the government had no title, then after the crude turpentine coming from both sources had been so intermingled, the confused mass was held as tenants in common by the Union Naval Stores Co., and the United States government, and either of them had the right to the possession of the whole, but subject to the rights of the other to its proportionate interest therein, and if the Union Naval Stores Co., obtained possession of such intermingled mass, and it does not appear from the evidence either that the Union Naval Stores Co., ever sold it, or any part of it, or otherwise converted the same, or that the United States ever demanded of the Union Naval Stores Co., its portion thereof, then the United States would not be entitled to recover in this action for a conversion of its share of said property.' (Rec., pp. 82-83.)"

Twenty-eighth. Said Circuit Court of Appeals erred in not sustaining the Fiftieth assignment of error upon the record in said cause, which said assignment of error was as follows:

"50. The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that the mortgage and contract which has been introduced in evidence, gave the Naval Stores Co., the right of possession to the crude turpentine obtained by H. M. Rayford & Co., from lands other than those of the United States government as soon as it was obtained by H. M. Rayford & Co., and if H. M. Rayford & Co., also took other crude turpentine from the homestead in question without the knowledge or consent of the Union Naval Stores Company and so confused it with that upon which the Union Naval Stores Co., had a mortgage, as to make it impossible of identification or separation, then the Union Naval Stores Co., became entitled to the whole mass of commingled stuff as against H. M. Rayford & Co., as soon as the commingling had been done, and if the Union Naval Stores Co., in good faith took the commingled mass, without knowing that it contained turpentine that had been taken from lands of the United States government,

then it could in no event be liable for more than the value of the crude turpentine taken from the homestead at the time that it was commingled with the crude turpentine upon which the Union Naval Stores Co., had a mortgage, and the defendant could not be made liable for this amount without some evidence showing that it, the Union Naval Stores Co., in some manner converted the property after it came into its possession, and the mere taking possession of the commingled mass would not constitute a conversion of the property, unless it was further shown that the United States government demanded from the Union Naval Stores Co., its interest in the commingled mass and that the same was refused.' (Rec., pp. 83-84.)"

Twenty-ninth. Said Circuit Court of Appeals erred in rendering judgment against the plaintiff in error and in favor of said defendant in error for the costs of said suit in said Circuit Court of Appeals.

Wherefore, said Union Naval Stores Company, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of the said United States Circuit Court of Appeals for the Fifth Circuit in the above entitled cause to the prejudice of the plaintiff in error the said judgment of the United States Circuit Court of Appeals be reversed, annulled, and held for naught, and that the said cause be remanded to the United States District Court for the Southern District of Alabama with instructions to grant a new trial in said cause, and for such further proceedings in said cause as may be determined upon by this Honorable Court, to the end that justice may be done in the premises.

(Signed)

RICHARD WM. STOUTZ.

Attorney for Plaintiff in Error.

Bond on Writ of Error.

Filed January 30th, 1914.

United States Circuit Court of Appeals, Fifth Circuit.

Bond.

Know All Men by These Presents, that we, Union Naval Stores Company, a corporation, principal, and Fidelity & Deposit Company of Maryland, Surety, are held and firmly bound unto the United States of America in the full and just sum of \$500.00, to be paid to the said United States of America; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 30th day of January, A. D., one thousand nineteen hundred and fourteen.

Whereas, lately at a term of the United States Circuit Court of Appeals for the Fifth Circuit in a suit pending in said court, between Union Naval Stores Company, as plaintiff in error, and the United States of America, as defendant in error, a judgment was

rendered against said Union Naval Stores Company as plaintiff in error, and the said Union Naval Stores Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing said United States of America to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the 28th day of February next.

Now, the condition of the above obligation is such, that if the said Union Naval Stores Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its said plea good, then the above obligation to be void, otherwise to be and remain in full force and virtue.

(Signed) UNION NAVAL STORES COMPANY,
By G. F. MASON, *V. P.* [SEAL.]
FIDELITY & DEPOSIT CO. OF
MD., [SEAL]
By P. M. MILNER,
Attorney-in-Fact.

Attest:

C. H. CULBERTSON, *Agent.*

Signed, sealed and delivered in
the presence of:

(Signed) W. S. PARKERSON.
A. A. NICOLL.

Approved by—

(Signed) DON A. PARDEE,
[SEAL.] *Circuit Judge.*

Clerk's Certificate.

UNITED STATES OF AMERICA,
*United States Circuit Court
of Appeals, Fifth Circuit:*

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 107 to 144 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2415, wherein Union Naval Stores Company, a corporation, is plaintiff in error, and the United States of America is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 106 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 21st day of February, A. D. 1914.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
*Clerk of the United States Circuit
Court of Appeals.*

THE UNITED STATES OF AMERICA:

The President of the United States to The United States of America,
Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error sued out and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fifth Circuit, in the cause wherein Union Naval Stores Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, this 29th day of January, 1914, in the year of our Lord one thousand nine hundred and fourteen.

DON A. PARDEE,
United States Circuit Judge.

[Endorsed:] 1411-243. Rec'd in office January 30, 1914, and executed Feby. 2, 1914, by serving a copy hereof on H. T. Pegues, Assistant U. S. Attorney, at Mobile, Ala. G. B. Deans, U. S. Marshal, per D. D. Horton, Dep'ty U. S. M. No. 2415. United States Circuit Court of Appeals, Fifth Circuit. Union Naval Stores Company, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation. U. S. Circuit Court of Appeals. Filed Feb. 17, 1914. Frank H. Mortimer, Clerk.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit,
Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals before you, or some of you, between the Union Naval Stores Company, a corporation, plaintiff in error, and the United States of America, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the

parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 29th day of January, in the year of our Lord one thousand nine hundred and Fourteen.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
*Clerk of the United States Circuit
Court of Appeals.*

Allowed by—

DON A. PARDEE,
Circuit Judge.

I hereby certify that a true copy of the within Writ has this day been lodged in the Clerk's Office for the use of the Defendant in Error.

Dated this 29th day of January, A. D. 1914.

FRANK H. MORTIMER,
*Clerk of the U. S. Circuit Court of
Appeals for the Fifth Circuit.*

[Endorsed:] No. 2415. United States Circuit Court of Appeals, Fifth Circuit. Union Naval Stores Company, Plaintiff in Error, vs. United States of America, Defendant in Error. Writ of Error.

Endorsed on cover: File No. 24,075. U. S. Circuit Court Appeals, 5th Circuit. Term No. 377. Union Naval Stores Company, plaintiff in error, vs. The United States. Filed February 27th, 1914. File No. 24,075.

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JAMES D. MAHER

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No. 80

In the
Supreme Court of the United States.
October Term, 1914.

UNION NAVAL STORES COMPANY, a Corporation,
Plaintiff in Error,

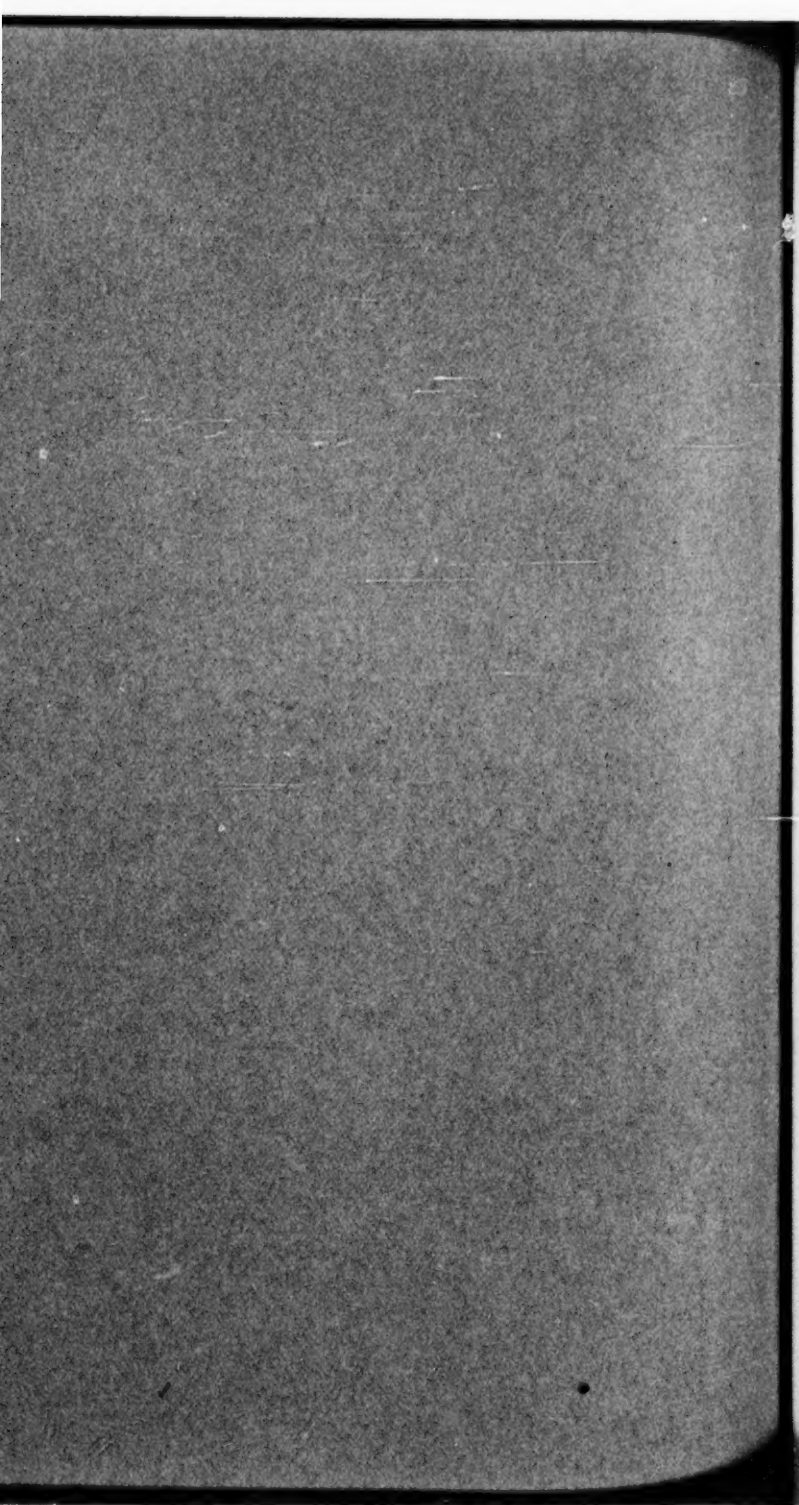
vs.

The UNITED STATES of AMERICA,
Defendant in Error.

**MEMOR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.**

Brief for Plaintiff in Error, Union Naval Stores Co.

RICHARD W. STOUTZ,
Attorney for Plaintiff in Error.



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In the
SUPREME COURT OF THE UNITED STATES.
October Term, 1914.

No. 377.

UNION NAVAL STORES COMPANY, a Corporation,
Plaintiff in Error,

vs.

The UNITED STATES of AMERICA,
Defendant in Error.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

**BRIEF OF R. W. STOUTZ, ATTORNEY FOR
PLAINTIFF IN ERROR.**

Statement of the Case.

The defendant in error, the United States of America, brought suit against the plaintiff in error, the Union Naval Stores Company, for the conversion of spirits of turpentine and rosin alleged to have been taken by the plaintiff in error from the *South-east Quarter of the Southeast Quarter and the South Half of Fraction "B", Section 29*; the Southwest

Quarter of the Southwest Quarter of Section 28; and the Northwest Quarter of the Northwest Quarter of Section 33, Township 5 South, Range 4 West, in the County of Mobile, State of Alabama, which land was alleged to be known as the Louis I. Freeland homestead. (For complaint, see Rec., p. 1.) The trial was upon count one of the complaint. In reality there was no Fraction "B" in Section 29. The proceedings under which Freeland entered his homestead (Rec. p. 5, *et seq.*) developed the fact that, although the application receipts originally referred to Section "B" (Record p. 8-9), the application was amended on April 6th, 1905, so as to substitute the South Half of Lot 3 and the South Half of Lot 4 for the South Half of Fraction "B", (Record, p. 14.) (See the Report of the Register to the Commissioner, Rec., pp. 5 and 6. Also the map attached to the Field Notes, Rec., p. 56.)

No evidence was introduced as to Fraction "B" except as hereinafter stated in argument, but it was made to appear that the other lands described in the complaint, together with Lots 3 and 4 in Section 29, did constitute an incomplete homestead entry by Lewis I. Freeland which was in effect in 1903, 1904 and 1905. Amongst the facts that were shown by the evidence without conflict, it appeared that Louis I. Freeland not only entered the lands described in the complaint (with the exception of Fraction "B", as already explained), as a homestead, but he owned much other lands in the same neigh-

borhood. Freeland leased all of his lands, including this homestead, to one H. M. Rayford for turpentine purposes.

There was evidence showing that during the years 1903 and 1904 a crew of men who were then working for said Rayford, boxed the pine trees on some of the land identified by the surveyors as the Freeland homestead, except about forty acres thereof, and gathered crude gum or turpentine therefrom. There was evidence which the government claims tends to show that the gum so gathered was hauled to the still of said Rayford near Grand Bay. Defendant denies this tendency and this point is discussed in argument upon the requested peremptory instruction.

Most of the witnesses treated the Freeland homestead as *co-terminus* in its boundaries with what they would refer to as the "Richard Hubbard boxes," being certain boxes that had been worked by a negro named Richard Hubbard. (Rec., pp. 16, 46.) It was without dispute, however, that the Richard Hubbard boxes did not include 40 acres of the Freeland homestead, but that the Richard Hubbard boxes did include a certain 40 acres that was outside of the Freeland homestead. (Rec., p. 51.) The estimates that bore upon the timber and the number of boxes and quantity of produce from the Richard Hubbard boxes, were not explained by any testimony indicating that the average of the Richard Hubbard timber and boxes was the same average as

the Freeland homestead timber and boxes. No evidence was offered showing whether the 40 acres of the Freeland homestead not covered by the Richard Hubbard boxes was above or below the average of the timber on the rest of the homestead, nor whether the average of the timber and boxes on the 40 acres of Richard Hubbard boxes outside of the Freeland homestead was above or below the average of the remainder of the boxes embraced within the designation of Richard Hubbard boxes.

Rayford's operation in 1903 and 1904, however, was a general operation over an extended tract of land including certain parts of this homestead not clearly identified as above stated, the turpentine being taken by him indiscriminately from all of the land operated by him and mixed together in the crude by Rayford, without the knowledge or consent of the defendant, so that the gum coming from one parcel of land could not be separated from that coming from another parcel. The great bulk of the crude so mixed came from lands not here involved, and was the undisputed property of Rayford and subject to defendant's mortgage lien as soon as acquired by Rayford. See the mortgage in record, pages 31-38. All of this appears from the testimony of Louis I. Freeland, Daniel F. Britton, and A. P. Rayford (Rec., p. 15-24).

On December 21st, 1903, H. M. Rayford entered into a contract with the Union Naval Stores Company (Rec., p. 25 *et seq.*) by which he under-

took and promised to cut and box at least ten crops of 10,500 boxes each from lands described in a certain deed of trust of even date therewith to J. W. Wade, as trustee of the plaintiff in error, and to diligently work said boxes, manufacture the crude turpentine into spirits of turpentine and rosin, and deliver the manufactured product at such points as the plaintiff in error, the Union Naval Stores Company, might designate, for all of which the Union Naval Stores Company agreed to pay H. M. Rayford certain designated prices. The deed of trust referred to in this contract is to be found on Record, page 31, *et seq.* It was executed to secure an indebtedness from H. M. Rayford to the Union Naval Stores Co., and it covered all the leases, leaseholds, and other interests in lands then owned by H. M. Rayford, or thereafter during the continuance of the deed of trust, and until the indebtedness was paid, acquired by him. It also covered all the turpentine boxes and all the products therefrom that might be acquired by Rayford during this period. Also all crude and manufactured turpentine, spirits of turpentine, rosin and other products owned or in any manner acquired by Rayford. The deed of trust, however, contained the following express agreement (Rec., p. 35):

“And the party of the first part hereby covenants and agrees that said party of the first part will not box, cut or work any trees upon land of the United States, or upon any lands

which have not been fully proven up, and that said party of the first part will not purchase or in any manner acquire any crude turpentine or manufactured turpentine or rosin gathered or produced from trees upon lands of the United States, or upon any lands which have not been fully proven up; and should said party of the first part violate any of the covenants and agreements in this paragraph contained, said company may, without notice, declare all sums hereby secured presently due and payable, and it or said trustee may proceed immediately to foreclose as hereinafter provided."

Whether the crude, which was taken by Rayford from the homestead, was mixed with the crude that had been taken by him from other lands before it reached the still or not, it appears from the undisputed testimony that it was all mixed together indiscriminately by Rayford as soon as it reached his still, and that it was then all indiscriminately dumped into the still and manufactured into turpentine and rosin. Upon this subject, Louis I. Freeland testified as follows (Rec., p. 17):

"Mr. Rayford had a lot of other turpentine boxes around my neighborhood. I think he had thirteen crops, each containing 10,500 boxes. These thirteen crops I speak of were on other lands than my homestead. I could not say that any of the turpentine I saw at the still at any time had come from my homestead. I couldn't swear that any of it came from there, nor could I identify any of the barrels. None of the stuff was so marked as to distinguish it from other

stuff from other places. It was all in the same kind of barrels. You could not separate the stuff that came from this homestead from other stuff when they were here together on the platform if you tried. The manner of the wagons gathering the stuff in the woods when I saw them was that the woodsmen generally came out with a load of barrels, and they put probably four or five barrels for each crop, and go on, may be, three or four miles further to another crop, and put barrels there. Whenever there are barrels enough to load a team, the team would go around and pick some out of this crop and some out of another."

Mr. A. P. Rayford testified upon this subject (Rec., p. 24):

"When the turpentine was brought in from the woods, it was brought in from all parts of the woods where my father had boxes and brought to the still. There was no separation made of the stuff that comes from one crop of boxes from that which came from another crop. There was no means of telling, when the stuff came to the still, what stuff came from one tract of land and what came from another. It was mingled at the still on the platform before being manufactured. If it was new dip, it was put in a separate place until we got a charge of that. All the common grade went in one place, and all the good in another. * * * We put twelve barrels of crude in the still at a time for a charge. It was all mixed together in the still tank, and part of it comes out as rosin and part as spirits. When it comes out, you can't distinguish any part coming from one lot of crude from that

coming from another lot of crude. There was no attempt made to separate it, and no method of doing it.”

He also testified that his father had twenty crops of boxes (bottom p. 19).

The only testimony connecting the Union Naval Stores Company with this turpentine, consisted—

1. Of the contract and deed of trust already referred to;
2. Of a written admission (Rec., pp. 39-40) by the Union Naval Stores Company, to the effect that it obtained a large amount of turpentine and rosin from H. M. Rayford & Company *under said contract and deed of trust*. This admission, however, stipulated that it was not an admission that any part of this turpentine and rosin came from government lands or from any lands described in the complaint;
3. Of the testimony of A. P. Rayford, who is a son of H. M. Rayford, to the effect that his father shipped all of his turpentine and rosin to the Union Naval Stores Company at Mobile. How this stuff was consigned, whether the freight was prepaid, or whether it was actually transported and delivered by the railroad, was left to surmise, there being no evidence on the subject. There was no evidence in the cause as to what the plaintiff in error, the Union Naval Stores

Company, did with any turpentine that it received from H. M. Rayford, except that it rendered accounts of sales to Rayford from time to time as sales were made. There was no evidence of the value of crude turpentine. The evidence as to the quantity of crude taken by Rayford, and as to the quality of the manufactured product, consisted merely of estimates by experts based upon unauthorized assumptions of facts as to the character of the timber, and as to the ability of the stiller, upon which there was no evidence. No demand was made by the government before the suit.

The other facts, relating to the rulings complained of, are stated sufficiently for a correct understanding in connection with the respective rulings where argued.

There was judgment on verdict by the jury in the Circuit Court in favor of the Government for the sum of \$2447.55 and costs. On writ of error to the Circuit Court of Appeals for the Fifth Circuit, that court directed a remittitur of the interest which had erroneously been included in the judgment and otherwise affirmed the case. (Rec., p. 109). The remittitur was entered in the trial court in the sum of \$747.86 and the judgment stood affirmed for the remaining \$1699.69 (Rec., p. 110) and upon the latter the writ of error was sued out to this court.

The questions involved in this writ of error are in substance as follows:

That there was not sufficient evidence to justify the submission of the case to the jury, this point being made by a request by the plaintiff in error for a peremptory instruction to find for the defendant. That the evidence was too hazy and uncertain to justify the recovery of any more than nominal damages. That there was no liability on defendant in error because at the time of the acts complained of it was not unlawful to extract crude gum from unproved homesteads which had been duly entered. That even if it was unlawful to extract crude gum from unproved homesteads, the admixture by Rayford without the knowledge of the defendant company, who is plaintiff in error, of an indeterminate quantity of crude gum taken from the unproved homestead, the legal title to which was still in the Government, with a *much larger and indeterminate* quantity of crude gum which unquestionably belonged to Rayford, all of which was later transmuted into other commodities by the process of distillation, operated to merge the smaller indeterminate quantity of Government gum into the larger quantity under the doctrine of accession. That plaintiff in error was mortgagee of Rayford both as to crude gum and manufactured products, and entitled to protection as such mortgagee, whose rights could not be prejudiced by Rayford's acts, whatever might have been the consequence as against Rayford himself

who was not a party to the action. That Rayford, although informed as to the facts concerning the unproved homestead in question, was honestly of the impression that his taking of Government gum therefrom, if he did, was not unlawful and he should not be classed as a wilful trespasser. That it was at least a question for a jury whether he was a wilful trespasser or merely acted under mistake, if a trespasser at all, and that the court erred in charging that as a matter of law he was a wilful trespasser who ought to be mulcted in the highest measure of damages, and that the defendant company, who, as mortgagee, took the refined products distilled from the admixed mass, must likewise be punished by the highest measure of damages although its innocence as taker under its mortgage was conceded. That the court erred in not limiting the damages against the innocent mortgagee to the value of the crude gum at the time of the inception of the rights of the defendant company under its mortgage lien upon the admixed crude gum.

These points are raised chiefly by instructions given at the request of the Government and excepted to by the plaintiff in error, and by instructions requested by the plaintiff in error and refused by the court, with exceptions reserved, all as indicated more particularly in the assignments of error and the argument which follows in this brief.

ASSIGNMENTS of ERROR.

The assignments of error relied upon in this case are as follows:

First. Said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the Southern District of Alabama which said District Court of the United States for the Southern District of Alabama rendered judgment against the plaintiff in error and in favor of the defendant in error on December 19, 1911, for \$2,447.55 and the costs of the suit, which said judgment was affirmed by said United States Circuit Court of Appeals for the Fifth Circuit with the direction "that a remittitur be entered upon the judgment in the amount of that part of the interest included in it computed from the time of the purchase of the turpentine and rosin by the plaintiff in error up to the date of the filing of the suit and that the judgment be thereupon affirmed with costs," pursuant to which remittitur there was entered in said District Court of the United States for the Southern District of Alabama on April 24, 1913, a remittitur of said interest in the sum of \$747.86 so that after said remittitur was entered said judgment stood for the sum of \$1699.69 as of the date of December 19, 1911, thus affirmed by said United States Circuit Court of Appeals for the Fifth Circuit.

Second. Said Circuit Court of Appeals erred in not reversing said judgment of the United States District Court for the Southern District of Alabama and in not remanding said cause to said District Court for a new trial.

Third. Said Circuit Court of Appeals erred in not sustaining the seventh assignment of error upon the record in said cause, which said assignment of error was as follows:

“7. The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (a), and which was as follows:

(a) ‘If you believe from the evidence that Henry Rayford knew, or had notice that the land described in the complaint was the unperfected homestead entry of Lewis I. Freeland, and said Rayford extracted or caused to be extracted the gum from trees on said homestead and manufactured the same into spirits of turpentine and rosin; if you further believe that Rayford delivered the said turpentine and rosin to the defendants and the defendants converted the same to its own use, or exercised acts of ownership or dominion over it, such as by appropriating it to the payment of, or a credit upon, any indebtedness due them by said Rayford, or by a sale of such produce by the defendants, that is, a sale by them of the turpentine and rosin received from Rayford if it came from this particular gum—that would be a conversion.’ (Rec., p. 62.)”

Fourth. Said Circuit Court of Appeals erred in not sustaining the assignment of error numbered seven and one-half upon the record in said cause, which said assignment of error was as follows:

“7 1/2. The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (b), and which was as follows:

(b) ‘and if you find that to be so, then you should find for the plaintiffs for the market value of such spirits of turpentine and rosin at the time that the same was delivered to the defendants, with interest thereon from that time to this day.’ (Rec., p. 62.)”

Fifth. Said Circuit Court of Appeals erred in not sustaining the eighth assignment of error upon the record in said cause, which said assignment of error was as follows:

“8. The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (a), and which was as follows:

(a) ‘If you believe from the evidence that Rayford knew, or had notice that the land described in the complaint was the unperfected homestead entry of said Freeland, and that Rayford extracted or caused to be extracted crude gum from trees on said homestead, and manufactured the same into spirits of turpentine and rosin, and if you further believe from the evidence that Rayford delivered said turpentine and rosin to

the defendants, or caused it to be delivered to defendants, and defendants converted same to its own use, or exercised acts of ownership or dominion over it, as in either manner I have explained to you, then you should find for the plaintiff for the market value of said spirits of turpentine and rosin at the time same was delivered to defendants, with interest thereon from that time to this date.' (Rec., pp. 62-3.)"

Sixth. Said Circuit Court of Appeals erred in not sustaining the ninth assignment of error upon the record in said cause, which said assignment of error was as follows:

"9. The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (c), and which was as follows:

(c) 'The boxing of trees by a settler on public land covered by an unperfected homestead entry, or by any person who knew it was public land (which an unperfected homestead entry is), and the extracting of crude turpentine therefrom, constitutes in law an intentional, wilful trespass, although he may have acted without knowledge of the illegality of the act; and from such persons the United States are entitled to recover the value of the produce manufactured from such crude turpentine by the settler or from any person into whose possession the same may have passed.' (Rec., p. 63.)"

Seventh. Said Circuit Court of Appeals erred in not sustaining the tenth assignment of error upon the record in said cause, which said assignment of error was as follows:

“10. The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (d), and which was as follows:

(d) ‘and in such case no demand could be made or was required from Rayford to the defendants, and no demand, therefore, would be required, or necessary, to be made by the United States of Rayford’s purchasers, or of him who held the title under and from Rayford, before suit was brought.’ (Rec., p. 63.)”

Eighth. Said Circuit Court of Appeals erred in not sustaining the eleventh assignment of error upon the record in said cause, which said assignment of error was as follows:

“11. The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (e), and which was as follows:

(e) ‘The plaintiffs contend that the fact that Rayford had a contract with the defendants to deliver to it all the turpentine and rosin manufactured, or otherwise obtained by him during the time covered by the contract, and the fact that Rayford during that time, at least the years 1904 and 1905, worked the said homestead or a part of it and obtained crude gum therefrom

to manufacture turpentine and rosin and caused to be hauled or did haul any of this crude gum from said homestead to, or in the direction of, the still operated by Rayford, and that spirits of turpentine and rosin were manufactured at that still, and all of it was shipped to the defendants at Mobile, and the bills of lading were sent by Rayford to the defendants of such shipments, and a large amount of turpentine and rosin was received by the defendants from Rayford during the season said land was worked by him (I believe that is shown by the paper furnished by the defendants), and that accounts of sales were furnished to Rayford showing the amount of proceeds and the disposition of the same, to some extent at least, it not being fully shown by the evidence as to the disposition; and they further contend that the fact that there is evidence showing or tending to show that Rayford shipped to no one else during that time—plaintiffs contend that all these facts and circumstances should be considered by you in determining whether or not the defendants received the turpentine and rosin manufactured by Rayford from gum obtained from said land; and they further contend that these facts and circumstances are established by the evidence in the case, and that they are sufficient to reasonably satisfy you that the said turpentine and rosin came into defendant's possession and were converted by it.

The defendants take issue with the plaintiffs as to these contentions and insist that they are wholly insufficient and that

you should not give such weight to them as they claim for them.

Now, if you find these facts and circumstances have been shown by the evidence in this case, you may properly, and you should, consider them in determining the issues in the case, and give to them such weight as in your judgment is fair and reasonable.' (Rec., pp. 64-5.)"

Ninth. Said Circuit Court of Appeals erred in not sustaining the twelfth assignment of error upon the record in said cause, which said assignment of error was as follows:

"12. The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (f), and which was as follows:

(f) 'If you are so reasonably satisfied, then the plaintiffs are entitled to recover from the defendants the value of such turpentine and rosin at the time it was received by the defendants, with interest thereon to date.' (Rec., p. 65.)"

Tenth. Said Circuit Court of Appeals erred in not sustaining the thirteenth assignment of error upon the record in said cause, which said assignment of error was as follows:

"13. The court erred in giving the following written charge at the request of the plaintiff:

'If the jury are satisfied from the evidence that the defendant corporation received manufactured turpentine and rosin

which had been manufactured by Rayford from crude gum obtained from timber then growing on the land described in the complaint, then in ascertaining the amount of same, they may take into consideration the fact that the wrong of the defendant's vendor, Rayford, in obtaining crude gum from the Freeland homestead and mixing it with other crude gum obtained by him from other land and manufacturing it into turpentine and rosin makes the determination of turpentine and rosin received by the defendants, which had been so manufactured, from gum obtained from the Freeland homestead difficult; and the jury may, in order to determine such quantity, make every reasonable inference which may be drawn from and justified by the testimony, in favor of the plaintiff.' (Rec., pp. 66-7.)"

Eleventh. Said Circuit Court of Appeals erred in not sustaining the fourteenth assignment of error upon the record in said cause, which said assignment of error was as follows:

"14. The court erred in giving the following written charge at the request of the plaintiff:

'The court charges the jury that if they believe from the evidence that the defendants obtained any rosin which had theretofore been manufactured by Rayford from crude gum obtained from the Freeland homestead and are unable to determine from the evidence the various grades of rosin so manufactured and the amount of each grade so obtained, they may find for the plaintiff for the average grade so obtained,

if they can ascertain such average grade from the evidence in the case, and if they cannot from the evidence reasonably determine such grade they should find for the plaintiff for the value of the lowest grade of rosin.' (Rec., p. 67.)"

Twelfth. Said Circuit Court of Appeals erred in not sustaining the nineteenth assignment of error upon the record in said cause, which said assignment of error was as follows:

"19. The court erred in refusing the written request of the defendant to charge the jury as follows:

'The court charges the jury that a sale by a tenant in common, to constitute a conversion, must be made in such manner as to authorize the party to whom it is sold to set up an adverse claim to the other tenant in common, or to place the property in such position that the other tenant in common could not enforce his right to the enjoyment of his share of the property as against the purchaser as well as he could enjoy it against the original tenant in common.' (Rec., p. 70.)"

Thirteenth. Said Circuit Court of Appeals erred in not sustaining the twenty-fifth assignment of error upon the record in said cause, which said assignment of error was as follows:

"25. The court erred in refusing the written request of the defendant to charge the jury as follows:

‘The court charges the jury that there is no evidence in this cause as to the value of crude turpentine, and if the jury believe from the evidence that the Union Naval Stores Company obtained the right of possession of the crude turpentine taken from the homestead in question without any knowledge of the fact that it had come from lands of the United States Government, but under the *bona fide* belief that it had been taken from private lands, then the jury cannot find for the plaintiff for more than one cent.’ (Rec., p. 72)’

Fourteenth. Said Circuit Court of Appeals erred in not sustaining the twenty-sixth assignment of error upon the record in said cause, which said assignment of error was as follows:

“26. The court erred in refusing the written request of the defendant to charge the jury as follows:

‘The court charges the jury that if they should find a verdict for the plaintiff, and believe from the evidence that the defendant did not know that the property so converted was taken from lands of the United States, and if the jury further believe from the evidence that moneys advanced by the defendant to Rayford were used by Rayford for the purpose of defraying the expense of distilling and transporting the same, the measure of damages would be the value of the crude gum when severed from the trees in the woods at the time and place when said gum was originally converted by those who took it from government lands,

and not the value after being transported or after being manufactured into more valuable product.' (Rec., pp. 72-73.)"

Fifteenth. Said Circuit Court of Appeals erred in not sustaining the twenty-seventh assignment of error upon the record in said cause, which said assignment of error was as follows:

"27. The court erred in refusing the written request of the defendant to charge the jury as follows:

'The court charges the jury that no one is bound to assume, in ordinary commercial transactions, that a party with whom he deals is a wrong-doer, and if such party with whom he deals presents property for sale, the title to which is apparently valid, and there are no circumstances disclosed or known by the purchaser which casts suspicion upon the title of the seller, he may rightfully deal with such seller, and if he pay full value of the same, acquire the rights of a purchaser in good faith.' (Rec., p. 73.)"

Sixteenth. Said Circuit Court of Appeals erred in not sustaining the thirty-first assignment of error upon the record in said cause, which said assignment of error was as follows:

"31. The court erred in refusing the written request of the defendant to charge the jury as follows:

'The court charges the jury that it is the law that one who enters into an ordinary

and reasonable contract for the purchase of property from another need not presume that the seller is a wrong-doer, nor must he make a search inquiring as to the validity of the seller's claim to the property.' (Rec., p. 74.)"

Seventeenth. Said Circuit Court of Appeals erred in not sustaining the thirty-fourth assignment of error upon the record in said cause, which said assignment of error was as follows:

"34. The court erred in refusing the written request of the defendant to charge the jury as follows:

'The court charges the jury that if they believe the evidence in this case, they ought not to find a verdict for the plaintiff under the first count of the complaint.' (Rec., p. 75.)"

Eighteenth. Said Circuit Court of Appeals erred in not sustaining the thirty-fifth assignment of error upon the record in said cause, which said assignment of error was as follows:

"35. The court erred in refusing the written request of the defendant to charge the jury as follows:

'The court charges the jury that if in the opinion of the jury the evidence in this case is so indefinite that it does not reasonably satisfy the jury that any definite quantity of spirits of turpentine or rosin manufactured from said crude gum so taken from government land was converted by the

defendant company, the jury ought not to find a verdict for more than nominal damages in this case, even if they should find a verdict for the plaintiff at all'. (Rec. p. 75)''

Nineteenth. Said Circuit Court of Appeals erred in not sustaining the thirty-sixth assignment of error upon the record in said cause, which said assignment of error was as follows:

“36. The court erred in refusing the written request of the defendant to charge the jury as follows:

‘The court charges the jury that if they believe the evidence in this case, they ought to find a verdict for the defendant.’ (Rec., p. 76.)”

Twentieth. Said Circuit Court of Appeals erred in not sustaining the forty-first assignment of error upon the record in said cause, which said assignment of error was as follows:

“41. The court erred in refusing the written request of the defendant to charge the jury as follows:

‘The court charges the jury that if they should find a verdict for the plaintiff in this case, and if they believe from the evidence that moneys advanced by the defendant to Rayford were used by him for the purpose of paying the expenses of distilling the crude gum taken from government lands, and for the purpose of shipping the same, the measure of damages against this defendant would be the value of the crude tur-

pentine in its original state when originally taken from the trees and not the value of the manufactured product after it was manufactured or improved by distilling it.' (Rec., p. 77.)"

Twenty-first. Said Circuit Court of Appeals erred in not sustaining the forty-third assignment of error upon the record in said cause, which said assignment of error was as follows:

"43. The court erred in refusing the written request of the defendant to charge the jury as follows:

'The court charges the jury that where a third person obtained possession of property belonging to two others, and without the knowledge or consent of either of the owners so confuses the two that they cannot be distinguished or identified, then the two owners of the different properties that have been so commingled become tenants in common in the commingled mass, and they both have the right of possession to the whole, and each of them have the right to their proportionate share of the proceeds, but neither of them can hold the other for a conversion of the property without showing that the other either did some act of conversion other than the mere taking possession thereof, or that they demanded of the other their proportion thereof and that it was refused.' (Rec., p. 78.)"

Twenty-second. Said Circuit Court of Appeals erred in not sustaining the forty-fourth assignment of error upon the record in said cause, which said assignment of error was as follows:

“44. The court erred in refusing the written request of the defendant to charge the jury as follows:

‘The court charges the jury that under the mortgage from H. M. Rayford & Co. to the Union Naval Stores Company, and the contract of sale between said parties, which has been introduced in evidence, the Union Naval Stores Company had the right to the possession of all the rosin and turpentine which was manufactured by H. M. Rayford & Co. from lands other than those in which the United States Government had the title, and if the jury believe from the evidence that H. M. Rayford & Company had obtained crude turpentine from the homestead in question, and obtained other crude turpentine from other lands, and that H. M. Rayford & Company then intermingled the crude turpentine obtained by them from both sources, without the consent of the Union Naval Stores Company, and then shipped the manufactured product to the Union Naval Stores Company, and that the Union Naval Stores Company received the same without knowing that any of the turpentine that came from the homestead entry in question was contained in the stuff which had been shipped to them, and if there is no evidence that the Union Naval Stores Company ever disposed thereof, or that the United States ever made any demand upon the Union Naval Stores Company for its share thereof, then the jury should find for the defendant.’ (Rec., p. 79.)”

Twenty-third. Said Circuit Court of Appeals erred in not sustaining the forty-fifth assignment of error upon the record in said cause, which said assignment of error was as follows:

“45. The court erred in refusing the written request of the defendant to charge the jury as follows:

‘The court charges the jury that where two parties own different portions of crude turpentine, and it passes into the possession of a third person, or where one party owns a part of said crude turpentine and the other party has the right of possession of the other portion of said turpentine under a mortgage, and the mortgagor confuses the whole into one mass, without the consent of the owner of either portion, or the owner of one part and the mortgagee of the other, and the said goods are so confused that they cannot thereafter be distinguished, then either of the owners in the one case, or the owner of one part and the mortgagee of the other, have each the right of possession of the whole, and neither can claim that the other has converted his property simply because he has taken possession of the confused mass without showing that he has demanded possession of his part and it has been refused to him.’ (Rec., p. 79.)”

Twenty-fourth. Said Circuit Court of Appeals erred in not sustaining the forty-sixth assignment of error upon the record in said cause, which said assignment of error was as follows:

“46. The court erred in refusing the writ-

ten request of the defendant to charge the jury as follows:

‘The court charges the jury that where the property of two persons become so commingled as to be incapable of separation, and this commingling is done either by the consent of both, or by accident, or by the action of some third person, without the consent of either, then the two owners become tenants in common, each having the right of possession to the whole and each owning an undivided interest therein in proportion to their respective properties that were so commingled, and under these circumstances neither party can hold the other for a conversion merely because such other takes possession of the whole, but in order to hold the other for a conversion they must go further and prove either that they demanded their share and that it was refused, or that such other had either sold the property or done some other act of conversion, and the mere taking of the possession of the whole would not constitute such an act of conversion.’ (Rec., p. 80.)”

Twenty-fifth. Said Circuit Court of Appeals erred in not sustaining the forty-seventh assignment of error upon the record in said cause, which said assignment of error was as follows:

“47. The court erred in refusing the written request of the defendant to charge the jury as follows:

‘The court charges the jury that if they believe from the evidence that the Union Naval Stores Company obtained from H. M.

Rayford & Co. the turpentine that was taken by them from the homestead entry in question, but that the Union Naval Stores Company at the time that it obtained said stuff was ignorant of the fact that it had been taken from lands belonging to the United States Government, but believed in good faith that the same had not been so obtained, then the plaintiff could in no event recover of the defendant more than the value of the turpentine at the time that the Union Naval Stores Company obtained the right of possession thereof as against the said H. M. Rayford & Co., and if the jury believe from the evidence that H. M. Rayford & Co. mixed the crude turpentine which they obtained from the homestead in question with other crude turpentine which they had obtained from other sources, and upon which the Union Naval Stores Co. held a mortgage, and that the said confusion was so made that it was thereafter impossible to distinguish which portion of the commingled mass came from the homestead entry in question, and which had been obtained from other sources, then the plaintiff could in no event recover of the defendant more than the value of the crude turpentine which came from the homestead entry at the time that it was so commingled with the crude turpentine upon which the defendant had a mortgage.' -(Rec., pp. 80-81.)"

Twenty-sixth. Said Circuit Court of Appeals erred in not sustaining the forty-eighth assignment of error upon the record in said cause, which said assignment of error was as follows:

“48. The court erred in refusing the written request of the defendant to charge the jury as follows:

‘The court charges the jury that if they find from the evidence in this case that the Union Naval Stores Co. came into the possession of the turpentine which came from the homestead in question only by virtue of receiving rosin and the spirits of turpentine which had been manufactured by H. M. Rayford & Company out of a commingled mass of crude turpentine which had been taken by H. M. Rayford & Co. partly from the homestead in question and partly from other lands and then commingled together and manufactured into rosin and spirits of turpentine, and if the jury further find that the Union Naval Stores Company held a mortgage and contract of sale from H. M. Rayford & Company, by the terms of which the Union Naval Stores Co. had the right to receive all of the rosin and spirits of turpentine manufactured by H. M. Rayford & Co. from lands other than those belonging to the United States Government and that the rosin and turpentine manufactured out of the commingled mass was shipped to the Union Naval Stores Co. under this contract and mortgage, then the jury should find for the defendant, unless they are further reasonably satisfied from the evidence that the plaintiff demanded from the Union Naval Stores Co. its proportionate interest in the spirits of turpentine and rosin before the beginning of this suit and that the same was refused, or that the Union Naval Stores Co. sold, or otherwise converted, the

rosin and spirits of turpentine which it received from H. M. Rayford & Co., and the court charges the jury that there has been no evidence tending to show that the plaintiff ever made such demand or that the Union Naval Stores Co. converted the spirits of turpentine and rosin that it received from H. M. Rayford & Co.' (Rec., pp. 81-82.)”

Twenty-seventh. Said Circuit Court of Appeals erred in not sustaining the forty-ninth assignment of error upon the record in said cause, which said assignment of error was as follows:

“49. The court erred in refusing the written request of the defendant to charge the jury as follows:

‘The court charges the jury that if they find from the evidence that the Union Naval Stores Co. had a contract of sale and mortgage from H. M. Rayford & Co., by virtue of which the title to the crude turpentine gotten by H. M. Rayford & Co. from lands other than those which vested in the government, passed immediately to the Union Naval Stores Co. as soon as the crude turpentine was gotten out, and if they further find from the evidence that H. M. Rayford & Co., without the consent of the Union Naval Stores Co., so intermingled the crude turpentine which they got from the homestead in question with that which they had gotten from other lands, and the title to which had passed to the Union Naval Stores Co., and that this intermingling was so done that it was impossible thereafter to distin-

guish the turpentine that came from the homestead in question from that which came from other lands in which the government had no title, then after the crude turpentine coming from both sources had been so intermingled, the confused mass was held as tenants in common by the Union Naval Stores Co. and the United States Government, and either of them had the right to the possession of the whole, but subject to the rights of the other to its proportionate interest therein, and if the Union Naval Stores Co. obtained possession of such intermingled mass, and it does not appear from the evidence either that the Union Naval Stores Co. ever sold it, or any part of it, or otherwise converted the same, or that the United States ever demanded of the Union Naval Stores Co. its portion thereof, then the United States would not be entitled to recover in this action for a conversion of its share of said property.' (Rec., pp. 82-83.)"

Twenty-eighth. Said Circuit Court of Appeals erred in not sustaining the fiftieth assignment of error upon the record in said cause, which said assignment of error was as follows:

"50. The court erred in refusing the written request of the defendant to charge the jury as follows:

'The court charges the jury that the mortgage and contract which has been introduced in evidence, gave the Naval Stores Co. the right of possession to the crude turpentine obtained by H. M. Rayford & Co.

from lands other than those of the United States government as soon as it was obtained by H. M. Rayford & Co., and if H. M. Rayford & Co. also took other crude turpentine from the homestead in question without the knowledge or consent of the Union Naval Stores Company and so confused it with that upon which the Union Naval Stores Co. had a mortgage, as to make it impossible of identification or separation, then the Union Naval Stores Co. became entitled to the whole mass of commingled stuff as against H. M. Rayford & Co. as soon as the commingling had been done, and if the Union Naval Stores Co. in good faith took the commingled mass, without knowing that it contained turpentine that had been taken from lands of the United States government, then it could in no event be liable for more than the value of the crude turpentine taken from the homestead at the time that it was commingled with the crude turpentine upon which the Union Naval Stores Co. had a mortgage, and the defendant could not be made liable for this amount without some evidence showing that it, the Union Naval Stores Co., in some manner converted the property after it came into its possession, and the mere taking possession of the commingled mass would not constitute a conversion of the property, unless it was further shown that the United States government demanded from the Union Naval Stores Co. its interest in the commingled mass and that the same was refused.' (Rec., pp. 83-84.)”

Twenty-ninth. Said Circuit Court of Appeals erred in rendering judgment against the plaintiff in error and in favor of said defendant in error for the costs of said suit in said Circuit Court of Appeals.

ARGUMENT.

The argument of the assignments of error is here put in order deemed logical and analytical of the case rather than numerical. In re-stating the assignments at the beginning of the divisions of the argument the formal parts are omitted and only the substance of the point made is stated. The number of the assignment is stated as it appears in this court followed by the parenthesized number of the same assignment in the Circuit Court of Appeals.

Seventeenth and Nineteenth Assignments of Error.

19. (36) The court erred in refusing the written request of the defendant to charge the jury as follows:

“The court charges the jury that if they believe the evidence in this case, they ought to find a verdict for the defendant.” (Rec. pp. 76, 94.)

17. (34) The court erred in refusing the written request of the defendant to charge the jury as follows:

“The court charges the jury that if they believe the evidence in this case, they ought not to find a verdict for the plaintiff under the first count of the complaint.” (Rec., pp. 75, 94.)

These assignments relate to the refusal to give a peremptory instruction to find for the defendant;

it was asked generally and also specially, as to each count. It was given as to the second count which was abandoned by the government and refused to the only remaining count, the first.

The peremptory instruction to find for the defendant should have been given.

The complaint claims for *spirits of turpentine* and *rosin taken from* certain described lands. (Record, p. 1) There was an utter failure of proof to show that any spirits of turpentine or rosin were *taken from* the lands described in the complaint.

There is no proof whatever to that effect, but it might plausibly be claimed that certain crude gum, *a different commodity known* to commerce and having a different name, was taken by Rayford from some of the lands described and carried to a distillery several miles away from the lands described, and there made into the chattels alleged to have been converted. If any *spirits of turpentine and rosin* were taken from the lands described the evidence is utterly silent about it.

Then, too, there was a failure to identify the land described in the complaint with that mentioned in the evidence as being government land from which Rayford got crude gum. The complaint describes the lands by governmental subdivisions, including a certain Fraction B; the evidence shows Fraction B to be either non-existent or totally different land; it further shows the lands from which

gum was gathered to be the "Richard Hubbard" boxes, which do not coincide with the description in the complaint.

As illustrating the failure to identify the lands described in the complaint as the same covered by the Richard Hubbard boxes, L. I. Freeland testifies: "The man doing the chipping here was named Richard Hubbard. (Rec., p. 16.) Richard Hubbard started to chipping the homestead that they claimed. The Richard Hubbard boxes didn't cover all of the homestead. The 80 acres that I lived on was included and there was a piece lying north of that that he chipped. That was all, I think, he chipped on two forties, and then he turned north. That homestead lay in a long strip, and one forty lays back south and one here, and there was forty in front of the place and a piece north there that he chipped. There was a place north of my place that he chipped and my place and the homestead that he chipped. He didn't chip the 40 that lay in 33. One forty of my homestead he didn't chip. He did chip the balance of my homestead and 40 acres besides in Section 28, as well as I remember."

Being asked how many acres there are in the Richard Hubbard boxes, the witness answered: "It was all in there except one forty, as I told you. He chipped this strip and the 40 in 28, and a little piece north of my place. The area covered by his boxes was the amount of my homestead, plus 40 acres of mine. But he didn't chip 40 acres that was in the

homestead. As to the number of acres, he left out one forty and chipped one forty in another piece of land." (Rec., pp. 51-52.)

Mat Owen testified: "I remember the character of boxes known by the name of the Richard Hubbard boxes. I don't know anything about the land lines of the land on which the Richard Hubbard boxes were located. I am familiar with the Richard Hubbard boxes, and rode through these boxes during the year 1906. I rode through them ordinarily once a day. It was my business to see that they were chipped and worked properly. (Rec., p. 46.)

Tom Ransom testified: "I know the Richard Hubbard boxes, but I didn't chip them while they were in charge of Mr. Rayford. They were in the charge of Mr. Pringle the year I chipped them. I don't know how many boxes there were in the Richard Hubbard boxes." (Rec., p. 60.)

Dan Britton testified: "I was present when Mr. Buck and Mr. Hoisington made the survey after the storm. I guess that is the land we have been talking about. I could not tell anything about the timber or the land then, for the timber was all down and I could not recognize it." (Rec., p. 19.)

A. P. Rayford testified: "In keeping our accounts of the product from the various lands, they were not kept separate by tracts of land, but according to crops of boxes. I don't know whether a sin-

gle crop was entirely on this Freeland homestead or whether it overlapped. I don't know whether there was a crop, or more or less than a crop on the so-called Freeland homestead. I don't know how many dips per annum were taken from the Freeland land. I don't know the kind or character of timber on the Freeland homestead away from the public road through it. My own knowledge of it is simply derived by seeing it so far as could be seen from the public road. I don't know whether the Freeland homestead was timbered, or whether there was bays or gaps on it." (Rec., p. 23.)

Still another element of uncertainty showing the utter failure of the government to make the evidence harmonize with the allegations of the complaint: The complaint includes a part of "Fraction B" of Section 29. (Rec., p. 1.) The witness, Holder, a government surveyor, located the Freeland homestead, so that the expert witnesses could make their "post mortem" examinations and testify to quantities and qualities of gum *they never saw*, and guess what could have been manufactured therefrom. He had a government map and field notes to go by. (Rec., p. 56, *et seq.*) He went by it, but it contains no "Fraction B." To get such a fraction, however, he arbitrarily, and without authority of any government survey or plat, takes fractions 3 and 4 on the plat and calls them fraction B, and thus makes a fit. He testified:

On cross examination, the witness stated that his authority for declaring fraction B the same as lots three and four, is that "I have fraction B here on my map. I made fraction B identical with those fractions three and four. I made a resurvey and made a map of it and called it fraction B. That is just as good."

Being asked, "This designation as fraction B is your designation, and not the government's designation?" the witness answered: "I can call it my designation, but it may be designated by fraction B somewhere else. I can't tell you where else it is so designated. The south half of south half of 29 is the same as fractions three and four. They are identical. Calling it fraction B is simply my designation, but I make it identical with the government. I can't show you now that the government had designated that as fraction B. When the district attorney showed me these field notes introduced in evidence, that was not my authority for stating it was fraction B. From the field notes, I stated that it was lots three and four. It is my designation of fraction B. In order to locate a piece of land you can call it anything."

On re-direct examination, the witness testified: "I prepared a map of the land I surveyed. The field notes in evidence show lots three and four. The land I surveyed was the south half of lot 3 and lot B in Sec. 29, and southwest of southwest of 28, and northwest of northwest of 33. What I call fraction

B is block three and four in the field notes. According to my notes, the land that I surveyed is the south half of lots three and four, Sec. 29, southwest of southwest of 28, northwest of northwest of 33, all in Township 5 S., range 4 W." (Rec., pp. 59-60.)

It may be claimed that the departmental correspondence on record (pp. 5-7) explains this. It does not. It shows original designation as part of fraction B *to have been an error*. (Rec., p. 7.) If the amendment to homestead application was a substitution of lands, manifestly fraction B is not same as lots 3 and 4. If the designation was erroneous, as the letter says, without an actual substitution of one parcel of land for another, then "Fraction B" is not a proper description at all. If there was such a lot as "Fraction B," the change to part of lots 3 and 4 would be a *change* of description, not a correction of an erroneous one. If, as the letter says, the designation as fraction B was an error, it could only be an error by being a non-existent (*i. e.*, unauthorized) designation, or because it actually described another piece of land. In any event, the description fraction B in the complaint and the evidence did not fit each other and there was an utter failure of evidence as to any product coming from fraction B. If there was no fraction B at all, the description thereof in the complaint must be treated as nullity, and if it is a nullity, the estimates of the government witnesses *exceed the utmost possible limits of what is left of the complaint*. If there was actually a parcel

designated as fraction B, the complaint relates to one parcel and the evidence to an entirely different one. There was no evidence as to the area of fraction B and the estimates by the government witnesses are manifestly too large to fit what remains in the description if fraction B be eliminated therefrom.

Still another element of uncertainty in the evidence which makes it fail to measure up to the standard of proving a *prima facie* case under the allegations: The complaint claims for product manufactured from gum gathered in years 1904 and 1905. It is undisputed that Pringle bought the farm in November, 1905, and worked until the September storm of 1906. (Rec., pp. 23, 46.) The estimate of the government witnesses, particularly Hoisington, is that the post mortem examination showed "streaks" on the prostrate trees indicating a quantity of cultivation usually done in three years working thereof. (Rec., pp. 42, 45.) His *estimate* was for the first and second years of Rayford's supposed work (1904 and 1905), and he apparently allows for and makes no estimate for the third year (1906) of his guess, during which Pringle worked it. His guess work is entirely in disregard of the fact that Rayford boxed part of the Freeland homestead in 1903 (Rec., p. 15) and worked it that year, too (Rec., p. 19). It is not shown just what part was so worked in 1903, but it is quite evident that the evidences of the *extent* of work which forms the basis of the Hoisington guess

(which is the basis of the verdict), and which he arbitrarily apportions $\frac{2}{3}$ to the Rayford operations for 1904 and 1905, and $\frac{1}{3}$ to Pringle operation in 1906, are not capable of accurate apportionment—some undefined portion is apportionable to the Rayford operation of 1903 which is not in suit, and as to which there is a total want of evidence concerning the disposition of Rayford's production. Can we take what an "expert" surmises to be evidence of 3 years' producing, and which the evidence shows to have been distributed over four years, in part, at least, the first and last of which are not concerned in the suit, and arbitrarily charge defendants, who are innocent of participation therein, with $\frac{2}{3}$ of it for the two middle years? No authority has ever laid down the proposition that an allegation that a stated quantity of product was produced in 1904 and 1905 is proven by evidence tending (if it does so tend) to show a greater aggregate quantity for the years 1903, 1904, 1905 and 1906, and let the jury guess how much is apportionable to 1904 and 1905. Even though such an opportunity for guesswork may "reasonably satisfy" some jurors, it falls short of that reasonable measure of proof which the law requires.

These assignments also raise some questions arising out of the confusion of goods. Conceding, for the sake of argument on this point, that the proof sufficiently shows (as it hopelessly fails to do), that Rayford got government gum from the lands de-

scribed in the complaint, and distilled it and shipped it to the defendant company, and the latter effectually disposed of it, still the government cannot recover for the reasons now stated.

It is proven beyond a shadow of doubt or conflict, that the defendant company had a mortgage on Rayford's product, both crude and manufactured (Rec., p. 34), though the course of dealing was for him to manufacture the crude into spirits of turpentine and rosin, and ship that in (Rec., p. 25); that the crude was inextricably mixed with the other crude as soon as it reached the still (Rec., pp. 24, 17), and that the total of stuff handled by Rayford with unquestioned title was many times that claimed by the government, even upon the most inflated estimate of its most optimistic expert. No value of crude gum was attempted to be proven. It was shown, without conflict by the government evidence, that first year gum will produce more spirits of turpentine and better grades of rosin than older gum, under skillful handling, and that the older the boxes the less in quantity and less valuable in quality is the product therefrom. Rayford had both kinds of boxes, new and old, and naturally got both new product and old product therefrom.

Now, if Rayford's unquestionably-owned product was of uniform kind and value with that taken from government land, as to which he *might* not have title, then as to the admixed crude gum Rayford and the government became (probably) ten-

ants in common, provided their proportionate ownership could reasonably be ascertained, and the solution of their rights should be on that basis. If the goods so admixed were not of uniform value, or if they were uniform, and it is impossible to reasonably apportion them, then no tenancy in common arises, but the smaller quantity is swallowed up in the greater quantity under the doctrine of accession, and the government must seek its remedy against the one who converted its gum before its extinguishment—Rayford.

As between Rayford, the tortfeasor, and the government, the latter could claim the whole confused mass, but the third-party rights of the defendant company as mortgagee prevents that result.

We submit that the evidence shows such hopeless confusion and admixtures of unknown quantities and varying qualities of gum that no reasonable ascertainment of the rights of the parties as tenants in common is possible; therefore, that the government property was swallowed up under the doctrine of "accession," and will cite authority upon that theory.

The government, in view of the higher values thereof, stakes its case upon its supposed rights to a given but unproven quantity of manufactured product of unknown quality and value. If the identity of the government's *crude* gum became lost, the identity of product made therefrom is

more hopeless. It is certain that the proven variations in values of the differing grades of manufactured product, together with the hopeless inability to prove any quantity of each grade, make the doctrine of "accession" more certainly applicable.

If the evidence justifies holding that a tenancy in common existed, the rights of the parties will be argued under the next group of assignments of error.

The Doctrine of Accession.

Under the authorities, without any conflict whatsoever that might apply to this case, the Union Naval Stores Company is not liable at all in this case. This conclusion is worked out through the doctrine of "accession" of property, when applied to the undisputed evidence, which doctrine is closely allied to, and sometimes grows out of, the doctrine of "confusion of goods," but is distinguished therefrom, as hereinafter pointed out.

Under both the civil and common law, if the identity of the goods is lost, so that the identity cannot be further traced, the title of the goods is lost. It is considered that the goods are consumed. Illustrations of this will be given hereafter. This is in harmony with the principle that the law does not attempt the impossible, and only so long as the goods can be traced may they be followed. The

two principles are in exact harmony, and the one is the complement of the other. So long as the goods can be identified, they may be followed, in which event the doctrine of accession does not apply. Where the identification of the property ceases to be attainable, as when the goods are inseparably admixed with those of another species, or when they are added to other *principal* goods as a mere incident thereto, or minor part thereof, or when they are attached to land and become realty, they are treated as belonging to the principal thing, under the doctrine of accession, and the right of following them ceases.

ACCESSION TO REALTY

There is a line of authorities which hold that when personalty is attached to realty, as bricks, lumber or machinery, when built into a house, these things cease to be personalty, and become merged into the realty. In that case the identity is considered lost, and the right to follow the same ceases and the doctrine of accession applies. This doctrine goes even to the extent of holding that the rights of the owner and the rights of a chattel mortgagee thereof may be thus annihilated through the doctrine of accession and merged into the realty. The effect of the first line of cases mentioned, is that, under the doctrine of accession, personal property may be thus taken from one without legal process, and

though he knows where it went, and can prove it, it is lost to him in specie.

—*Pierce v. Goddard*, 39 Mass. 559 (22 Pick.) :
Fryatt v. Sullivan, 5 Hill (N. Y.) 117;
Ricketts v. Dorrel, 55 Ind. 473;
Millar v. Humphreys, 9 Ky. 447;

We quote the head note from *Pierce v. Goddard*,
supra:

“Where a lot of land and a dwelling thereon, were mortgaged, and the mortgagor subsequently removed the house and used a portion of the materials, together with new materials, in the erection of a house on another lot belonging to him, which, together with the house, he afterwards, for a valuable consideration, conveyed to a third person, it was held that as the materials used in the construction of the new house became a part of the freehold, the right of property therein vested in such third person by the conveyance of the land to him; *and that therefore trover could not be maintained against him by the mortgagee, either for the new house or for the old materials used in its construction.*”

In these instances, the owner of the property has his remedy against *the party who last had it before it ceased to exist as plaintiff's property*, and before its accession to the other property, and that is as far as his remedy can go. He has no claim against others who may deal with the new things in their changed character, of which the former property has become a part, under the doctrine of accession.

Nor is this principle unconstitutional. It existed before our constitutions were written, and was applied both by the ancient civil and common law. It is deemed to be recognized by the constitution as an existing principle, and the constitution is to be construed in the light of its existence.

—*Cecil v. Clark*, 44 W. Va. 659; 30 S. E. 216, 219.

It cannot be said that it is taking property without due process of law. It is no part of the principle of due process of law that the courts guarantee the collection of damages, or guarantee the damages to be as heavy as the plaintiff desires. Nor does the constitutional principle guarantee to find a solvent victim for the plaintiff to sue. It merely gives the machinery for a lawful remedy, founded upon a legal right according to an established mode of procedure, which is at the disposal of all entitled to enter the courts. It has never been declared to go to the extent of aiding a plaintiff to shoot over the head of the real tort-feasor at a more solvent victim, upon the theory of a technical liability, merely because it would please the plaintiff better. It has never gone to the extent of declaring that, because the defendant deals with property of a certain kind, he is responsible for the prior acts of third parties with reference to some of the materials which went into such property, when such materials have lost their identity in the eye of the law. The law recog-

nizes that certain rights are sometimes merged into other rights, and by such merger ceases to exist; thus a written contract liability may be merged into a judgment. It also recognizes that certain tangible property can undergo the same transformation and cease to exist in its original character, and the law will recognize it only in its new character, and will apply rights and remedies with reference to the new character only. It is consistent, also, with the laws of nature, which also recognize that property is sometimes considered as ceasing to exist in one form, and becoming irrevocably merged into property of some other form.

ACCESSION TO PERSONALTY

There is another line of cases based upon the same principles, holding that it is not necessary in the doctrine of "accession" for personal property to become merged into realty, to become non-existent. *Personal property may become merged into other personal property under the doctrine of accession, and thereby cease to exist in its prior character, in the eye of the law, as completely as if it were attached to realty.*

- Aborn v. Mason*, 1 Fed. Cas. No. 19, p. 39;
14 Blatch 405;
Woodruff & Beach Iron Works v. Adams,
37 Conn. 239;
Merritt v. Johnson, 7 Johns. 473 (N. Y.);
Davis v. Easley, 13 Ill. 198;

- Dunn v. Oneal*, 60 Am. Dec. 142; 1 Sneed (Tenn.) 106;
Pulcifer v. Page, 54 Am. Dec. 583 (32 Me. 404);
Arnott v. Kansas Pac. Ry. Co., 19 Kan., 95, 109-110;
Atchison, T. & S. F. Ry. Co. v. Schriver, 4 L. R. A. (N. S.) 1059, 84 Pac. 119;
Wetherbee v. Green, 7 Am. Rep. 655; 22 Mich. 311;
Brown v. Sax, 7 Cowen (N. Y.) 95;
Worth v. Northam, 26 N. C. 102, 104;
Carpenter v. Lingenfelter, 32 L. R. A. 430; 42 Neb. 728;
Ex parte Ames, 1 Lowell 561, 1 Fed. Cas. No. 323, p. 746.

“The general rule of the common law, in regard to title by accession, is that whatever alteration of form has taken place in personal property, the owner is entitled to such property in its state of improvement, unless the identity of the original materials has been destroyed, or unless the thing *has been annexed to and made a part of some other thing which is the principal*, or its nature has been changed from personal to real property; ‘but, if the thing itself, by such operation, was changed into a different species, as by making wine, oil or bread out of another’s grapes, olives or wheat, it belonged to the new operator, who was only to make satisfaction to the former proprietor for the materials which he had so converted.’ 2 Bl. Comm. 404; 2 Kent Comm. 364; *Silsbury v. McCaon*, 6 Hill 425; *Woodruff & Beach Iron Works v. Adams*, 37 Conn. 233.”

- Aborn v. Mason*, 1 Fed. Cas. No. 19, p. 39; 14 Blatch, 405;

“The spirit of common law forbids, as a general rule, that the owner of property should lose his title without his consent; and some of the rules of civil law, whereby title is changed by a mere change in the form and character of the property, may not be admitted as part of our law; *but the common law admits such loss of title in many familiar cases.* If, by natural causes, the soil of my land is carried upon my neighbors, and becomes inseparably mingled with it, my soil is lost to me, and if no fault or neglect of his caused the avulsion, I have no action at law against him, however much his land may be benefitted. *And even if, by my own wrongful act, the personal property of another becomes inseparably incorporated with my real estate the property may be changed so that the owner cannot follow it,* but is left to his remedy by action of law; as if I use another’s oil or lead in painting my house, or his nails, screws, brick or lime in building.”

—*Woodruff & Beach Iron Works v. Adams*,
37 Conn. 239.

Some of these cases are the very highest authority; and applying the highest of the ancient authorities, both in the civil and common law, they state the proposition that when the materials of another are united in my materials by my labor, or by the labor of another, and mine are the *principal materials*, and those of the other are only accessory, all the property becomes vested in me by right of accession. Numerous illustrations of this are given in the authorities.

—*Merritt v. Johnson*, 7 Johns 473 (N. Y.);

- Coursin's Appeal*, 79 Pa. St. 229;
Davis v. Easley, 13 Ill. 198;
Dunn v. Oneal, 60 Am. Dec. 142; 1 Snead
(Tenn.) 106.
Pulcifer v. Page, 54 Am. Dec. 583 (32 Me.
404);
Arnett v. Kansas Pac. Ry. Co., 19 Kan. 95,
109-110;
Atchison, T. & S. F. R. Co. v. Schriver, 4
L. R. A. (N. S.) 1059, 84 Pac. 119
(Kans.).

One of the oldest cases which is frequently spoken of as a leading case on that point in this country, is that of *Pulcifer v. Page*, *supra*, which concerned the title to an iron chain. Both plaintiff and defendant had broken chains, which they carried to a blacksmith, who, without their consent, united the two broken chains into one chain. Both plaintiff and defendant claimed the chain composed of the joined materials. The court squarely held that the party who owned the principal portion of the materials that composed the chain was the owner, and that the minor part became lost, or merged into the principal part, under the doctrine of accession. This authority has been followed by other courts in important cases and *has never been disputed*. It differentiates between accession and confusion. We quote from it as follows:

By Court, HOWARD, J. "This case presents a question of acquisition of property by accession, but does not involve an inquiry concerning the admixture or confusion of goods.

It is a general rule of law, that if the materials of one person are united to the materials of another by labor, forming a joint product, the owner of the principal materials will acquire the right of property in the whole by right of accession. This was a rule of the Roman and of the English law, and has been adopted, as it is understood, in the United States generally. Dig. 6, 161; Bracton *de acq. rerum dom.* b. 2, c., 2, secs. 3, 4; Molloy, b. 2, c. 1, sec. 7; Pothier, *Trait du droit de propriete*, 1, 1, c. 2, art. 3, No. 169-180; 2 Bla. Com. 404; 1 Bro. Civ. Law, 241; *Glover v. Austin*, 6 Pick. 209; *Sumner v. Hamlet*, 12 Id. 83; *Merrill v. Johnson*, 7 Johns. 474 (5 Am. Dec. 289); 2 Kent's Comm., 361."

—*Pulcifer v. Page*, 54 Am. Dec. 583 (32 Me. 404.)

The case was followed by other courts, including the Supreme Court of Kansas, whereof Justice DAVID J. BREWER, later of this Court, was a member, in an important case involving the title to a large lot of steel rails made from old rails and some new material furnished by a rolling mill company. The case was decided squarely upon the doctrine of accession, the decision being that title followed the ownership of the old rails, which was the principal materials used therein.

—*Arnott v. Kansas Pac. Ry. Co.*, 19 Kans. 95, 109-110.

In a New York case, where the original taking was tortious, and the *taking by defendant was like-*

wise tortious, the doctrine of accession by merging the property taken into some other principal property, was fully recognized as a principle existing from the very earliest time. The court said:

“CURIA. Here was, beyond all doubt, a tortious taking of the trees. The consent of the owner is not pretended. The taking of the logs by the defendants was also tortious. The only question is, whether former was entitled to the boards which the defendants made of them. We think the property was not changed by this act. The rule, in a case of a wrongful taking, is that the taker cannot, by any act of his own, acquire title, unless he either *destroys the identity of the thing*, as by changing money into a cup, or by grain into meal, or *annexing it to or making it a part of some other thing, which is the principal*; or changing its nature from personal to real property, as where it is worked into a dwelling house. Thus cloth made into a garment, leather into shoes, trees squared into timber and iron made into bars, may be reclaimed by the original owner in their new and improved state. (Bro. Property pl. 23; F. Moore 20 pl. 67.) These authorities are translated by Viner, in his Abridgement (Property E. pl. 5), and the doctrine traced up to the Year Books. The same distinctions are laid down by several cases in this court. *Betts v. Lee*, 5 Johns 348; *Curtis v. Groat*, 6 Id. 168; *Babcock v. Gill*, 10 Id. 287.”

—*Brown v. Sax*, 7 Cowen (N. Y.) 95.

In *ex parte Ames*, 1 Lowell, 561, 1 Fed. Cas. No. 323, p. 746, a mortgage upon a locomotive in

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course of manufacture was held to embrace additions to it by the doctrine of accession.

This principle is clearly distinguished and distinguishable from the doctrine of confusion of goods. Under the doctrine of confusion of goods, the usual result is that the party who wilfully or negligently mingles his goods with those of another, so that they cannot be separated, loses his goods to the innocent party. Where, however, the goods are all of the same kind and the same value, so that a prorating of the specific quantity belonging to each is practicable, they are considered as tenants in common to the extent of the respective quantities contributed by each. The authorities are *all agreed, that unless the goods are alike in quality, grade and value*, there is no tenancy in common, because of the impracticability of sharing equitably when the interest of each is not readily ascertainable. The following authorities declare that there is no tenancy in common if there is a difference in quality and grade of goods so mixed:

Lupton v. White, 33 Eng. Reprint 821; 15 Ves. Jr. 442;

Jenkins v. Steanka, 88 Am. Dec. 677; 19 Wis. 126;

Reed v. King, 12 S. W. 772 (Ky.)

The authorities are likewise perfectly agreed that there can be no recovery by one supposed tenant in common against the other in trover, conversion or replevin, unless the goods contributed by

each to a common mass are identical in quality, kind and value, so that a portion by measurement would be practicable and just.

- Piazzek v. White*, 23 Kan. 621;
Kimberly v. Patchin, 19 N. Y. 330;
Grimes v. Cannell, 23 Neb. 187, 36 N. W.
479;
Young v. Miles, 20 Wis. 622-3;
Weeks v. Hackett, 15 A. & E. Ann. Cases
1158, 104 Me. 264, 271;
Kaufman v. Schilling, 58 Mo. 219.

There are some cases which are but different applications of the doctrine of accession which hold that in case of the bestowal of labor *by even a wrongdoer* upon the goods of another, so as to impart extraordinary value to the goods, the goods would belong to the party who put the labor upon them, and not to the former owner. The most notable case of this kind is that of *Wetherbee v. Green*, 7 Am. Rep. 655, 22 Mich. 311, where Chief Justice COOLEY goes into the question at great length. It is admitted that the foundation of the principle is that the new value must be so great, as compared with the former value, that the disproportion is very marked, and it would be a shocking hardship and injustice to take the entire labor from one and bestow it upon another. The case then under consideration by Judge COOLEY, was one where \$25.00 worth of timber was made into hoops valued at \$700.00, and it was held that *even in the hands of the wrongdoer the doctrine of accession applied*,

and that the true owner could not recover either the goods in their changed form, or the value of the goods in their changed form. In the course of the discussion, he instanced a ton of metal of comparatively small value, made into watch springs, and other instances where the element of value, through labor added, greatly overshadowed the original cost of materials.

There is still another line of cases applying the doctrine of accession, which goes to the point, that where goods have been changed in character by being put through a process so that the original identity is lost, the original owner loses his property by reason of the change. The cases confess that it is hard to draw the line where the change is considered made, and where it is not. Many commodities can be recognized, notwithstanding some changes. Familiar illustrations, when the identity is considered lost, are those of making wine out of grapes, bread from wheat, and the like. Some illustrations to which the doctrine was not applied was the converting of trees into timber, lumber into shingles, and the like. It will be noticed that the cases where the change was held not to have occurred, were those where the original materials were recognizable and usually had no other materials added to them; while the cases where the whole materials were deemed to be lost were usually those of the intermixing of other materials and labor, so

that an entirely different *composite* commodity was brought into being. See

—*Wetherbee v. Green*, 7 Am. Rep. 655, 22 Mich. 311;

Lampton v. Preston, 19 Am. Dec. 105, 1 J. J. Marsh (Ky.) 454.

It will be noticed, under the specific holding of these authorities, that the doctrine of accession to property *is not confined to cases of innocent taking*. Indeed, the question of innocence or culpability has nothing to do with the doctrine of accession. It is doubtless upon the principle that the business of the world requires that property have some legal status apparent to the world in which it might be considered by people who may deal with it. The commerce of the world requires as much protection as the rights of the individual. The principle has been broadly stated by this court, thus:

“We do not understand the law to be as stated, or that one who enters into an ordinary or reasonable contract for the purchase of property from another, is bound to presume that the vendor is a wrongdoer, and that, therefore, he must make a searching inquiry as to the validity of his claim to the property. The rule of the law in respect to purchase of land or timber is the same as that which obtains in other commercial transactions, and such a rule as is claimed by counsel would shake the foundations of commercial business. No one is bound to assume that the party with whom he deals is a wrongdoer, and if he presents

property the title to which is apparently valid, and there are no circumstances disclosed which cast suspicion upon the title, he may rightfully deal with him, and, paying full value for the same, acquires the rights of a purchaser in good faith. *Jones v. Simpson*, 116 U. S. 609-615, 29 L. ed. 742-744, 6 Sup. Ct. Rep. 538. He is not bound to make a searching examination of all the account books of the vendor, nor to hunt for anything to cast a suspicion upon the integrity of the title."

—*U. S. v. Detroit T. & L. Co.*, 100 U. S. 331-2, 50 L. ed. 503.

It seems to be desirable that a house may be dealt with as such, and not solely in the light of the lumber, bricks, etc., which went into it. A person buying a house, and investigating the title, ought not to be required to mentally dissect the house as to the materials which compose it, and again mentally follow the finished materials back into their raw state and investigate title to all such raw materials, to feel that he can safely buy the house. The same thing applies to the purchase of ships, clothing, groceries, medicine or any other commodity. Machinery should be considered as such, without the necessity of investigating the title to the iron ore which was converted into steel, and then made into machinery. It would seem, upon similar principles, that spirits of turpentine and rosin, which are as different from crude gum as a house is from a tree, should be considered as a separate

and distinct commodity in itself, to be dealt with as such, although labor has changed the raw material into the finished product in each case. If this were a case where only the government's gum was taken and put through the distillery and sent to the defendant, it could be plausibly claimed that the defendant received the plaintiff's goods, although changed in species. But such is not the case. In the instant case, taking the view of the evidence most favorable to the government, a quantity, *though a very uncertain quantity*, of raw material of *mixed and uncertain quality*, was mixed with a *very much larger proportion* of assorted grades of materials belonging to the operator, Rayford. It would be the merest guess work, both as to quantity and quality, to attempt to tell the relative values of the raw material belonging to the government and to the operator which went into the still. The quantity of crude turpentine depends, as the evidence shows, upon the character of the work done—that is to say, whether the laborers were skillful and diligent, or negligent and slothful; the amount of time they put on it; the size of the timber, because large boxes in large trees flow more gum than small boxes in small trees; the number of trees per acre; the number of boxes cut therein; because a big tree will cut three boxes and a small tree only one box; the depth of the incision, because a deep box can contain more gum than a shallow box; whether there was much or little trash mixed with

the gum; whether the season averaged hot, or only moderately warm, because the gum flows faster in hot weather than in cool. All of these contingencies affect the quantity of crude gum gathered. Then the diligence with which the gum is gathered, and whether the same is permitted to waste by overflow of the boxes, and the skill of the distiller to produce the best results and grades with the raw material furnished. The evidence shows, without dispute, that the first year's gum produces *several* grades of rosin of the better grades. The second year produces *several* grades of lesser quality, and the third year produces *several* grades of still less quality. There is *not even a pretense of estimate by anybody as to the amount of each grade produced from the year's crop of crude*. The same elements of uncertainty surround the gum which belonged to the operator, with which the government gum became mixed.

Who, therefore, can tell the quantity and grade of the product produced from a certain described parcel of government land, even, if it all went to the still of the operator, especially when the evidence chiefly relied on by the government is inspecting the premises *years after* the operations were concluded, *after the timber was all cut or blown down* and when there is nothing left except stumps? As well might an architect give an opinion on the value and describe the interior finish of a house he never saw, after it is destroyed by fire,

by looking at the brick pillars that are left unburned. If these elements of uncertainty as to quantity and quality of the admixed property be conceded to be indefinite, then the doctrine of accession of property applies, by the mixing of the small per cent of government stuff with the very much larger per cent of non-government stuff. The only excuse for not applying the doctrine of accession is to apply the tenancy in common, upon the theory that the *grades are all equal*, and the relative qualities established with reasonable certainty. *No tenancy in common has ever been sustained under a confusion of goods, without it being known with reasonable certainty the proportion of goods contributed by each, nor unless the goods are all of equal grades.* There are two federal cases wherein the doctrine of tenancy in common was applied to confused goods. One of them was the *Distilled Spirits* case,

(28 Fed. Cases No. 16580; 3 Clifford 261; affirmed in *Harrington v. U. S.*, 11 Wall 356; 20 L. ed. 167;)

which was the case of a lot of distilled spirits under forfeiture to the government for violation of the revenue law, being mixed with a lot of other stuff, and it was held that no difficulty arose, inasmuch as the stuff was *all of the same grade and value*, and the admixture was held to be immaterial, and that the government could rightfully claim the quantity

originally subject to forfeiture. Another case was that of the *Intermingled Cotton* cases,

(92 U. S. 651; 23 L. ed. 756;)

which concerned a lot of cotton confiscated by the military authorities during the Civil War. This cotton was sold and the proceeds turned into the treasury. No separate account was kept, identification of the separate bales was impossible, and there was no proof of any variation in grade. The government, as trustee of the funds of the owners, applied the doctrine of tenancy in common in proportion to the number of bales, with which determination the beneficial owners were satisfied. There was no evidence to show that that rule was improper or unfair, and it was certainly the only rule, and the most equitable thing that could be done under the circumstances.

The argument for the government in the circuit court of appeals stoutly claimed that the doctrine of accession could not apply to the benefit of plaintiff in error upon the idea that Rayford was a guilty trespasser and that not Rayford, but the plaintiff in error, should be punished upon that hypothesis.

The government's contention as stated in its brief below was as follows:

“However, if the Court should be of the opinion that the change from crude gum to refined spirits of turpentine and resin, is such a

change as would in some instances give rise to a change of title, we respectfully submit this doctrine is not applied, according to the great weight of authority, whenever the party who makes the change is a wilful trespasser, or whenever he takes materials which he knows belong to another, mixes it with his own, and out of the mixture, manufactures something of a different species.

"In considering this we respectfully desire to call the Court's particular attention to the fact that it was not the Union Naval Stores Company who made the change from crude gum to spirits of turpentine and resin. Had they made the change, *being apparently innocent parties*, a different question might arise, but in this instance the change was made by the wilful trespasser, who knew the identity and the ownership of the crude gum obtained from government land." * * *

The government brief also cited and quoted from *Leimpton v. Preston*, 19 Am. Dec. 104, as follows:

"By exploring the civil and common law, so far as they bear on this case, some confusion will be found in their rules, as well as in the application of them to particular cases. But there are two comprehensive and fundamental rules pervading all the authorities which have been consulted on the doctrine of accession and of specification; from the first of which it is not known that there are any exceptions, and from the last of which it is believed that there cannot be many. These rules are: 1. That no trespasser who takes property of another want-

only and without the owner's consent, can ever acquire the right to it by any 'accession' or 'specification' whatsoever. 2. Where the property of one comes to the possession of another innocently, he may acquire the right to it if by 'accession' or 'specification' the species be changed. * * *

The vice of the government's contention is twofold; *first*, it ignores the rights of the plaintiff in error as mortgagee next to be argued, and *second*, it is quite in error in assuming that Rayford was to be classed as a wilful trespasser. It was shown without the shadow of doubt that Rayford (who was dead at the time of the trial) was honestly of the belief that it was not wrongful to extract gum from unproved homesteads entered by homesteaders. Freeland testified that Rayford "said there was no law against turpentineing." (Rec. pp. 15-16) * * * "He says, no, there is no law against turpentineing a piece of homestead land as long as you are on it." (Record p. 17). Rayford leased this and much other land from Freeland and Rayford "paid me a lump sum for the whole business." (Record p. 17.) The crude gum taken from the homestead was not kept separate from the other gum gathered by Rayford and it is incredible that he would have done business that way if aware of its illegality. He had the assurance of the Circuit Court of Appeals for the Fifth Circuit in this language:

"We think it is not a matter of common knowl-

edge that such cutting and boxing of pine trees destroys the value of the trees as timber, or that it has a tendency even to retard the growth of the trees. It is, however, we think, a matter of common knowledge, of which we may take notice, that on March 2, 1831, and long before that date, the 'turpentine business' was an industry most prevalent in all the parts of the country where there were pine-growing public lands; and if it had been the intention to protect these public lands from the ravages of that business, it would have been easy to make that intention clear by the use of appropriate words."

—*Bryant v. U. S.*, 105 Fed. 941.

The vice in the government contention, and the trial court's erroneous assumption, is that because Rayford knew that this was an unproved home-
stead that he also knew that it was against the law to turpentine it; this is doubtless based upon an erroneous application of the maxim that every man is conclusively presumed to know the law. The true application of the maxim is that every man is presumed to know the law to such an extent that he may be held responsible for, and required to compensate another for an injury done such other, and as against this measure of responsibility no plea of ignorance of the law will avail. BUT THIS MAXIM HAS NEVER BEEN APPLIED TO PUNISH HIM BEYOND THAT MEASURE FOR NOT KNOWING THE LAW. NOR SHOULD IT BE APPLIED TO PUNISH THIRD PARTIES INNOCENT OF CONDUCT MERITING PUNISHMENT.

“If the defendant went upon the land and cut and removed the timber in good faith, believing that he had a right thereto, he was only answerable in damages for the stumpage value thereof and not for the manufactured value. This is the universally recognized rule of law and has been so applied to alleged trespasses under this statute.”

-- *Morgan v. U. S.*, 169 Fed. 249 (8th CCA.)

Gentry v. U. S., 101 Fed. 51 (8th CCA.)

U. S. v. Gentry, 119 Fed. 70 (8th CCA.)

U. S. v. Van Winkle, 113 Fed. 903 (9th CCA.)

U. S. v. Homestake Min. Co., 117 Fed. 481 (8th CCA.)

The only reply that the counsel for the Government made to the proposition that the turpentineing of the timber upon the homestead was not wrongful, is, that this was a criminal case, and that it did not preclude the idea that the conversion, while not criminally wrongful, might still amount to a trespass. To say the least of it, however, the statement by the Circuit Court of Appeals for Fifth Circuit, which we have just quoted, was certainly calculated to imbue the layman with the understanding that he was doing no wrong in turpentineing the Government homestead, and Mr. Rayford declared this to be his understanding at the time of the transaction, as appears from the testimony. We, therefore, deny that Mr. Rayford was, in any sense, a willful trespasser. We submit that his understanding of the law was correct, but whether it was so or not the

fact that he acted in good faith upon a reasonable construction of an opinion that has been rendered by the court of appeals ought certainly to protect him from being denounced as a wilful trespasser, or as a turpentine thief. The doctrine, which entitles the government to recover the increased value in manufactured rosin and turpentine over the crude, is based entirely upon the idea of punishing a wilful wrong-doer and this doctrine can have no reference to the man who acts upon an honest belief as to his legal rights, even though he may be mistaken as to the law. The distinction, which we rely upon, has been aptly stated by the Circuit Court of Appeals for the Eighth Circuit, in the case of *U. S. v. Homestake Min. Co.*, 117 Fed., 486, as follows:

“The question then is, did the trespasser violate the law, which he constructively knew, recklessly, or with an actual intent to do so, and to take an unconscientious advantage of his victim, or did he violate it inadvertently, unintentionally or in the honest belief that he was exercising his own right? If the former, he was a wilful trespasser, and the value of the manufactured timber or the extracted ore measures his liability. If the latter, he was an innocent trespasser, and the value of the *wood in the tree* or of the *ore in the mine* is the limit of his indebtedness. The test to determine whether one was a wilful or an innocent trespasser is not his violation of the law in the light of the maxim that every man knows the law, but his honest belief, and his actual intention at the time he committed the trespass; and neither a justifi-

cation of the acts nor any other complete defense to them is essential to the proof that he who committed them was not a wilful trespasser. *Durant Min. Co. v. Percy Consol. Min. Co.*, 93 Fed. 166, 168, 169, 35 C. C. A. 252, 254; *Gentry v. U. S.*, 101 Fed. 51, 54, 41 C. C. A. 185, 188; *U. S. v. Van Winkle*, 51 C. C. A. 533, 113 Fed. 903, 905."

THE FORFEITING DOCTRINE OF CONFUSION OF GOODS
DOES NOT APPLY AGAINST MORTGAGEES WHO
ARE INNOCENT THIRD PARTIES.

It is undoubtedly the law announced by an unbroken line of decisions, that *as between the innocent party and a wrongdoer* who mixes his own with the other goods, so that they cannot be separated, the innocent party would take the entire mass under the familiar doctrine of the confusion of goods. Were this suit between Rayford and the government, the government would be entitled to the entire admixed mass. But quite another principle applies if the wrongdoer mixes the property of two innocent third parties. In that event the forfeiture of the goods of either innocent party would not punish the wrongdoer, so the solution of the rights of the parties must depend on other principles. In the case at bar the defendant company had a mortgage lien on all crude gum lawfully acquired by Rayford as soon as he acquired it and *before the wrongful admixing with government gum*; the defendant

neither knew of nor consented to such mixing with government gum but had Rayford's express covenant that he would not acquire any government stuff. Defendant was, therefore, an innocent third party, whose goods were mixed by Rayford with government gum and it becomes necessary to inquire as to the rights of mortgagees under such circumstances.

In this case there was no evidence tending to show any knowledge by the plaintiff in error of Rayford's acts in mixing gum coming from unproved homesteads with other stuff. All the tendencies of the evidence were in favor of the innocence of the plaintiff in error. The brief for the government in the Circuit Court of Appeals expressly confessed the fact and the opinion of the Circuit Court of Appeals expressly declares it. (Record p. 169.)

Whatever the legal result of the admixture of the goods, as between the tortfeasor, Rayford and the government, it in no wise displaces the mortgage rights of the Union Naval Stores Company. Under the authorities its rights are fully protected under the doctrine of accession.

—*Smith v. Township of Au Gres.*, 9 L. R. A. (N. S.) 879 (C. C. A. 6th Cir.); 80 C. A. 145; 150 Fed. 257;

Merchants National Bank v. McLaughlin, 2 Fed. Rep. 128;

Ex Parte Ames, 1 Lowell 561; 1 Fed. Cas. No. 323, p. 746;

Weaver v. Neal, 55 S. E. 909, 910 (W. Va.);

Putnam v. Cushing, 76 Mass. 335 (10 Gray);
Willard v. Rice, 45 Am. Dec. 226; 11 Mete. 493 (Mass.);
Parker v. Williams, 1 Atl. Rep. 139 (Me.);
Wells v. Batts, 17 S. E. 417, 419; 112 N. C. 283.

In the case of *Smith v. Township of Au Gres*, *supra*, the Circuit Court of Appeals for the Sixth Circuit (Mr. Justice LUTTON being a member of the court), said concerning the strict rule of common law that the admixed property becomes the property of the innocent party whose goods were misappropriated:

“Justice requires that the rights of innocent third parties having acquired the property, *or some interest in it*, for value, should be protected, and against such the rule is not enforced.”

In *Merchants National Bank v. McLaughlin*, *supra*, the gist of the case is expressed in the head note which says:

“An innocent mortgagee will not be compelled to suffer by reason of the wrongful confusion of the goods by the mortgagor.”

This quotation expresses succinctly the distinction between cases where the forfeiting doctrine of confusion would be enforced against the mortgagor Rayford, but would not be enforced against the mortgagee. Indeed, the effect of the authorities

is that unless the wrongdoer can separate the goods, the mortgage will apply to the entire mass, and the mortgagee will be protected as such. This doctrine often applies *even against other innocent third parties*. The case of *Wells v. Batts*, 112 N. C. 283, 17 S. E. Rep. 417, 419, was one where a mortgagor-husband mixed the crops of his wife with the crops which he raised and mortgaged to his mortgagee. The wife was an innocent third party, but the mortgagee was protected.

Even though the government be deemed without fault in its failure to look after its property, it gave possession of the homestead to the homesteader and thereby permitted the original taker of the gum to get control of the gum, carry it to the still of the operator-mortgagor who put it in a converted shape so that when it reached the defendant (if it did) there was no possible way of defendant knowing that it was partly government property.

Along similar lines are two cases decided by the Circuit Court of Appeals for the Fourth Circuit, being the cases of

Tippett v. Barham, 180 Fed. 81, and
Union Trust Co. v. Southern Saw Mill & Lumber Co., 166 Fed. 199.

In both these cases the principle was established that the mortgage, even under a clause not specifically describing the property, but covering it under the "After-acquired property" clause, would prevail as to the property which was formerly per-

sonalty, but become affixed to and a part of the corpus of the property covered by the mortgage, *even to the extent of extinguishing former liens* upon the property while it stood in the character of personalty. Those cases are directly in point to the case at bar; in the second of the cases last mentioned, 166 Fed. 199, the court said:

“The conditional sales agreement never having been recorded, those claims cannot be allowed as against the bond-holders secured in the mortgage existing upon the property at the time of the delivery of the goods, and, the same having been used in and became part of the plant of the defendant corporation, became subject to the provisions of the “after acquired” property clause in the mortgage hereinbefore recited. In discussing these questions in *Evans v. Kister*, 92 Fed. 827, at page 836, 35 C. C. A. 28, at page 37 (Judges TAFT and LURTON presiding), it is said:

“ * * * If the machinery so purchased and set up has become so affixed *as to be part of the principal thing* it will pass under the mortgage, notwithstanding an agreement between the mortgagor and furnisher that the title shall remain in the vendor until payment. * * * Mere registration of an agreement between the mortgagor and vendor, preserving the personal character of the property affixed to the freehold mortgaged, will not prevent the attached property from passing under a previously existing mortgage. To prevent such a result, the mortgagee must be a party to the agreement’.”

Another case in that circuit to same effect is *Detroit S. C. Co. v. Sisterville Co.*, 195 Fed. 450 (4th C. C. A.)

The defendant, as a mortgage creditor, had a right to the corpus of the admixed property, under the doctrine of accession. Even if there were some government property there the non-government property greatly exceeded the government property, according to the evidence. It is undisputed that the defendant company did not know at the time the goods were received of any claim by the government arising out of these goods, nor did they know that the stuff came from government lands. They did not know (and do not know even now) the quantity of goods taken from the government lands. Nor would the rule be different even if they know it. Assuming that the government stuff admixed with the greater portion of non-government stuff, all in the changed character of manufactured product, was received and disposed of with reasonable promptness during the season of its production, seven or eight years ago, was the defendant under any obligation to refrain from selling the entire mass, or from selling any of it until the good pleasure of the government to make a claim and sue *several years thereafter*? Should the defendant keep the goods in storage while the market price went up and down, under the penalty of being a possible tort-feasor? Should they keep several years' production, worth thousands of dollars idle in a

warehouse at defendant's expense, losing by evaporation, and subject to loss by fire, for all these years? There is no way by which they could sue the government in partition, even if tenancy in common were conceded.

At common law there could be no partition of personalty:

21 A. & E. Enc. Law, 1145 (2nd ed.);

Smith v. Smith, 4 Rand (Va.) 95;

Irwin v. King, 28 N. C. 219.

Assuming, for the sake of argument, that the main facts are with the government, to-wit: that crude gum was extracted unlawfully from government trees, and by sufficient evidence is shown to have been received by the operator Rayfard, and by him admixed and with other gum distilled, and the entire product delivered to the defendant company; if the admixed property was of the same kind and value so that the parties might divide it in kind, so that each party could get his equitable part, and if the defendant converted the entire lot, it would be liable, because it could have refrained, and should have refrained from converting the part belonging to the government.

On the other hand, if the goods were *not* of the same kind, quality and value, so that a pro rata division in kind was not practicable the mixture of the property into an inseparable mass must be adjudicated on other settled principles. Unless the entire mass be-

came the property of the defendant, the defendant must have lost their entire property, because of the inability to divide it. The defendant company is not a tort-feasor, but like the government, was an innocent party, whose property was admixed without its consent and against its will, by the operator Rayford. The defendant can not more justly be punished for Rayford's tort, than could the government. As both parties are innocent, and neither can justly be punished for his own act, the matter of punishment of either of the interested parties in this case must be eliminated. That leaves as the only basis of adjudication the doctrine of accession, where the minor part is swallowed up by accession to the principal part, and the entire property went to the defendant. The consumption or extinction of the goods belonging to the government by their accession to the principal part belonging to the defendant company, clearly gave the government a right of action against Rayford for the conversion of its goods. But the right does not extend to the defendant, otherwise the doctrine of accession is annihilated.

When the property cannot be separated, being indivisible in kind, it is not the law that both parties must refrain from taking the other party's share under penalty of being a wrongdoer. In that event if both parties adhered to a purpose not to wrong the other, they must inflict wrong upon themselves in the shape of total losses, in spite of the

recognition, by fixed principles, of the rights of one or the other according to the above authorities.

Under the law the intermixed mass belongs either to the party having the principal material therein, or it belongs to both. It cannot belong to both because the materials are different, and the interests incapable of determination. Therefore, it must belong to one and that one is the party who held the principal ingredient.

Turpentine Not Prima Facie Wrongful.

There is still another principle upon which the law required the giving of a peremptory instruction in favor of defendant. Before the passage of the criminal statute of June 4, 1906 (34 Stat. at L. 208; 11 Fed. Stat. Ann. 419), it was not *prima facie* unlawful to box and work trees for turpentine. The circuit court of appeals for 5th circuit announced the law in the following language:

“We think it is not a matter of common knowledge that such cutting and boxing of pine trees destroys the value of the trees as timber, or that it has a tendency even to retard the growth of the trees. It is, however, we think, a matter of common knowledge, of which we may take notice, that on March 2, 1831, and long before that date, the ‘turpentine business’ was an industry most prevalent in all the parts of the country where there were pine-growing public lands; and if it had been the intention to protect these public lands from the

ravages of that business, it would have been easy to make that intention clear by the use of appropriate words.”

—*Bryant v. United States*, 105 Fed. 941, 944.

This decision has been followed as correct law in the case of

Orrell v. Bay Mfg. Co., 83 Miss. 800; 70 L. R. A. 881, 896,

which said: “A lease of timber (by a homesteader) for turpentine purposes is not forbidden by any express statutory provision.”

The same in effect was also decided by

Millikin v. Carmichael, 139 Ala. 226; 35 So. 706; 101 Am. St. Rep. 29.

In the recent case of

United States v. Waters Pierce Oil Co., 196 Fed. 767 (C. C. A. 8th Cir.),

the court, by JUDGE HOOK, said:

“There remains for consideration the question whether the homesteaders, whose entries were unperfected, lawfully cut or boxed the trees standing on the land and removed the sap therefrom, and the true construction of the Act of 1906. The turpentine industry has long prevailed in the South and been recognized as one of the important businesses. We do not judicially know that when it is carefully and conservatively conducted the continued life and vigor of the trees are impaired or the value of the land lessened. There is no common knowledge to that effect of which we can avail ourselves.

Prior to 1906 the land laws of the United States contained no definite prohibition of the practice as to trees on lands embraced in unperfected entries, and there is no course of reported judicial decisions indicating a settled policy of objection on the part of the Government. These considerations justify the conclusion that before the passage of the Act of Congress it was not unlawful for the entryman to make such use of the trees in the proper, customary way. *Bryant v. United States*, 45 C. C. A. 145, 105 Fed. 941."

There was no evidence in the case at bar concerning the methods of working, i. e., whether "carefully and conservatively" conducted or whether it was done in a wasteful manner calculated to impair the life of the trees. A violent storm came along and laid low all the timber, boxed and unboxed, and the effect of the boxing would be difficult to determine, years after all the timber passed out of existence.

It may be suggested that the later views of the Circuit Court of Appeals for the 5th Circuit in the *Parish* case, 184 Fed. 590, are out of harmony with the earlier views of this court and the Circuit Court of Appeals for the 8th Circuit and the Supreme Courts of Mississippi and Alabama. The *Parish* case was one of *admitted* liability, and the fight was upon the measure of damages only. The decision was correct upon the admitted liability, and therein it is widely distinguishable from the case at bar.

Eighteenth Assignment of Error.

18. (35) The court erred in refusing the written request of the defendant to charge the jury as follows:

“The court charges the jury that if in the opinion of the jury the evidence in this case is so indefinite that it does not reasonably satisfy the jury that any definite quantity of spirits of turpentine or rosin manufactured from said crude gum so taken from government land was converted by the defendant company, the jury ought not to find a verdict for more than nominal damages in this case, even if they should find a verdict for the plaintiff at all.” (Rec., pp. 75-6, 94.)

The charge indicated by the Eighteenth (Thirty-fifth) Assignment should have been given. The evidence should reasonably satisfy the jury that some definite thing is proven. The varying aspects of the evidence might justify a finding of any one of a dozen different amounts of gum was taken, but it is the jury's duty to say upon their oaths that the evidence reasonably satisfies them of some definite amount which is the basis of the verdict. Guesswork, quotient or average verdicts, and other forms of substituting indefiniteness of conviction for reasonable conviction of definiteness, are opposed to the spirit of the law. The jury cannot reach an honest verdict if they fail to agree on some definite basis upon which they are in accord. The charges did not require them to indicate by their verdict the basis thereof, nor did they require the

jury to be bound by the maximum quantity alleged or otherwise encroach on the jury's province. They did, by implication, require the jury to agree on something *definite*, the only honest basis of a verdict, and should have been given.

Twelfth and Twenty-first to Twenty-eighth Assignments of Error.

12. (19) The court erred in refusing the written request of the defendant to charge the jury as follows:

“The court charges the jury that a sale by a tenant in common, to constitute a conversion, must be made in such manner as to authorize the party to whom it is sold to set up an adverse claim to the other tenant in common, or to place the property in such position that the other tenant in common could not enforce his right to the enjoyment of his share of the property as against the purchaser as well as he could enjoy it against the original tenant in common.” (Rec., pp. 70-90.)

21. (43) The court erred in refusing the written request of the defendant to charge the jury as follows:

“The court charges the jury that where a third person obtained possession of property belonging to two others, and without the knowledge or consent of either of the owners so confuses the two that they cannot be distinguished or identified, then the two owners of the different properties that have been so commingled

become tenants in common in the commingled mass, and they both have the right of possession to the whole, and each of them have the right to their proportionate share of the proceeds, but neither of them can hold the other for a conversion of the property without showing that the other either did some act of conversion other than the mere taking possession thereof, or that they demanded of the other their proportion thereof and that it was refused." (Rec., pp. 78-96.)

22. (44) The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that under the mortgage from H. M. Rayford & Co. to the Union Naval Stores Company, and the contract of sale between said parties, which has been introduced in evidence, the Union Naval Stores Company had the right to the possession of all the rosin and turpentine which was manufactured by H. M. Rayford & Co. from lands other than those in which the United States government had the title, and if the jury believe from the evidence that H. M. Rayford & Company had obtained crude turpentine from the homestead in question, and obtained other crude turpentine from other lands, and that H. M. Rayford & Company then intermingled the crude turpentine obtained by them from both sources, without the consent of the Union Naval Stores Company, and then shipped the manufactured product to the Union Naval Stores Company, and that the Union Naval Stores Company received the same without knowing that any of the turpentine that came from the

homestead entry in question was contained in the stuff which had been shipped to them, and if there is no evidence that the Union Naval Stores Company ever disposed thereof, or that the United States ever made any demand upon the Union Naval Stores Company for its share thereof, then the jury should find for the defendant." (Rec., pp. 79, 96-7.)

23. (45) The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that where two parties own different portions of crude turpentine, and it passes into the possession of a third person, or where one party owns a part of said crude turpentine and the other party has the right of possession of the other portion of said turpentine under a mortgage, and the mortgagor confuses the whole into one mass, without the consent of the owner of either portion, or the owner of one part and the mortgagee of the other, and the said goods are so confused that they cannot thereafter be distinguished, then either of the owners in the one case, or the owner of one part and the mortgagee of the other, have each the right of possession of the whole, and neither can claim that the other has converted his property simply because he has taken possession of the confused mass without showing that he has demanded possession of his part and it has been refused to him." (Rec., pp. 79-80, 97.)

24. (46) The court erred in refusing the written request of the defendant to charge the jury as follows:

“The court charges the jury that where the property of two persons become so commingled as to be incapable of separation, and this commingling is done either by the consent of both, or by accident, or by the action of some third person, without the consent of either, then the two owners become tenants in common, each having the right of possession to the whole and each owning an undivided interest therein in proportion to their respective properties that were so commingled, and under these circumstances neither party can hold the other for a conversion merely because such other takes possession of the whole, but in order to hold the other for a conversion they must go further and prove either that they demanded their share and that it was refused, or that such other had either sold the property or done some other act of conversion, and the mere taking of the possession of the whole would not constitute such an act of conversion.” (Rec., pp. 80, 97-8.)

25. (47) The court erred in refusing the written request of the defendant to charge the jury as follows:

“The court charges the jury that if they believe from the evidence that the Union Naval Stores Company obtained from H. M. Rayford & Co. the turpentine that was taken by them from the homestead entry in question, but that the Union Naval Stores Company at the time that it obtained said stuff was ignorant of the fact that it had been taken from lands belonging to the United States government, but believed in good faith that the same had not been so obtained, then the plaintiff could in no event

recover of the defendant more than the value of the turpentine at the time that the Union Naval Stores Company obtained the right of possession thereof as against the said H. M. Rayford & Co., and if the jury believe from the evidence that H. M. Rayford & Co. mixed the crude turpentine which they obtained from the homestead in question with other crude turpentine which they had obtained from other sources, and upon which the Union Naval Stores Company held a mortgage, and that the said confusion was so made that it was thereafter impossible to distinguish which portion of the commingled mass came from the homestead entry in question, and which had been obtained from other sources, then the plaintiff could in no event recover of the defendant more than the value of the crude turpentine which came from the homestead entry at the time that it was so commingled with the crude turpentine upon which the defendant had a mortgage." (Rec., pp. 80-81, 98.)

26. (48) The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that if they find from the evidence in this case that the Union Naval Stores Co. came into the possession of the turpentine which came from the homestead in question only by virtue of receiving rosin and the spirits of turpentine which had been manufactured by H. M. Rayford & Company out of a commingled mass of crude turpentine which had been taken by H. M. Rayford & Co. partly from the homestead in question and partly from other lands and then

commingled together and manufactured into rosin and spirits of turpentine, and if the jury further find that the Union Naval Stores Company held a mortgage and contract of sale from H. M. Rayford & Company, by the terms of which the Union Naval Stores Co. had the right to receive all of the rosin and spirits of turpentine manufactured by H. M. Rayford & Co. from lands other than those belonging to the United States government, and that the rosin and turpentine manufactured out of the commingled mass was shipped to the Union Naval Stores Co. under this contract and mortgage, then the jury should find for the defendant, unless they are further reasonably satisfied from the evidence that the plaintiff demanded from the Union Naval Stores Co. its proportionate interest in the spirits of turpentine and rosin before the beginning of this suit and that the same was refused, or that the Union Naval Stores Co. sold, or otherwise converted, the rosin and spirits of turpentine which it received from H. M. Rayford & Co., and the court charges the jury that there has been no evidence tending to show that the plaintiff ever made such demand, or that the Union Naval Stores Co. converted the spirits of turpentine and rosin that it received from H. M. Rayford & Co." (Rec., pp. 81-82, 99.)

27. (49) The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that if they find from the evidence that the Union Naval Stores Co. had a contract of sale and mortgage from H. M. Rayford & Co., by virtue of which

the title to the crude turpentine gotten by H. M. Rayford & Co. from lands other than those which vested in the government, passed immediately to the Union Naval Stores Co. as soon as the crude turpentine was gotten out, and if they further find from the evidence that H. M. Rayford & Co., without the consent of the Union Naval Stores Co., so intermingled the crude turpentine which they got from the homestead in question with that which they had gotten from other lands, and the title to which had passed to the Union Naval Stores Co., and that this intermingling was so done that it was impossible thereafter to distinguish the turpentine that came from the homestead in question from that which came from other lands in which the government had no title, then after the crude turpentine coming from both sources had been so intermingled, the confused mass was held as tenants in common by the Union Naval Stores Co. and the United States government, and either of them had the right to the possession of the whole, but subject to the rights of the other to its proportionate interest therein, and if the Union Naval Stores Co. obtained possession of such intermingled mass, and it does not appear from the evidence either that the Union Naval Stores Co. ever sold it, or any part of it, or otherwise converted the same, or that the United States ever demanded of the Union Naval Stores Co. its portion thereof, then the United States would not be entitled to recover in this action for a conversion of its share of said property." (Rec., pp. 82-83, 99-100.)

28. (50) The court erred in refusing the written request of the defendant to charge the jury as follows:

“The court charges the jury that the mortgage and contract which has been introduced in evidence, gave the Naval Stores Co. the right of possession to the crude turpentine obtained by H. M. Rayford & Co. from lands other than those of the United States government as soon as it was obtained by H. M. Rayford & Co., and if H. M. Rayford & Co. also took other crude turpentine from the homestead in question without the knowledge or consent of the Union Naval Stores Company and so confused it with that upon which the Union Naval Stores Co. had a mortgage, as to make it impossible of identification or separation, then the Union Naval Stores Co. became entitled to the whole mass of commingled stuff as against H. M. Rayford & Co. as soon as the commingling had been done, and if the Union Naval Stores Co. in good faith took the commingled mass, without knowing that it contained turpentine that had been taken from lands of the United States government, then it could in no event be liable for more than the value of the crude turpentine taken from the homestead at the time that it was commingled with the crude turpentine upon which the Union Naval Stores Co. had a mortgage, and the defendant could not be made liable for this amount without some evidence showing that it, the Union Naval Stores Co., in some manner converted the property after it came into its possession, and the mere taking possession of the commingled mass would not constitute a conversion of the property, unless it was further shown that the United States

government demanded from the Union Naval Stores Co. its interest in the commingled mass and that the same was refused." (Rec., pp. 83-84, 100-1.)

If a tenancy in common existed in the manufactured product the possession of it by defendant company was not tortious. Defendant company had a mortgage on all that Rayford produced, excluding, of course, government stuff which Rayford contracted not to acquire in any manner. The mortgage gave a right of possession. Each tenant in common had a right of possession. To show conversion by a tenant in common there must be either a demand for possession and a refusal thereof,

Bond v. Ward, 5 Am. Dec. 30; 7 Mass. 123;
Burnham v. Marshall, 56 Vt. 365, 367;
Gibson v. McIntire, 81 N. W. 701 (Iowa);
Smith v. Welch, 10 Wis. 94;
Kewawnee County v. Decker, 30 Wis. 636,

or a showing that some disposition was made thereof that was inconsistent with and destructive of the rights of the co-tenant.

These charges raise these points in varying manners to fit appropriate aspects of the evidence and they are in accord with the law of the land and should have been given.

The Twenty-fifth (Forty-seventh) Assignment specially raises the point that the hopeless intermingling took place while the government gum was in its crude or unmanufactured state. It might

have been possible to adjust the rights of Rayford and the government as tenants in common of the crude by treating it as uniform in value and guessing at the quantities. To mix it with other stuff and destroy its species by converting it into something else of unascertainable quality, quantity and value, operated as a complete *conversion* thereof and loss thereof to the government, even though the evidence be held to show that defendant company later got it in an unascertainable form, quantity, quality or value. In that event, the conversion being of the gum in its crude shape, only the crude value could be recovered, and the recovery could be had only against Rayford; defendant company never did get or convert the crude; that had been lost under the doctrine of accession.

“One who effects a substantial change in the form or nature of property without the knowledge or consent of the owner is liable for a conversion, and trover will lie for the new product if the owner has not lost title thereto under the doctrine of accession.”

—38 Cyc, 2026;

Riddle v. Driver, 12 Ala. 590;

Curtis v. Groat, 6 Johns. 168; 5 Am. Dec.

204;

Brown v. Sax, 7 Cowen 95.

Seventh Assignment of Error.

7. (10) The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (*d*), and which was as follows:

(d) “and in such case no demand could be made or was required from Rayford to the defendants, and no demand, therefore, would be required, or necessary, to be made by the United States of Rayford’s purchasers, or of him who held the title under and from Rayford, before suit was brought.” (Rec., pp. 63-66, 87.)

This instruction was erroneous in its assumption that one could not be a purchaser without being a conversioner. One may become legal purchaser of a larger mass into which this has been incorporated, by accession, and from which it cannot be separated or distinguished. The instruction ignores that condition which was undisputed by the evidence. It also ignores defendant’s rights as mortgagee to possession of the mortgaged mass with which government gum may have been mixed; also defendant’s rights as tenant in common, if a tenancy in common was established, under which a demand was necessary to liability. Authority *supra*.

Third and Fifth Assignments of Error.

3. (7) The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (a), and which was as follows:

(a) “If you believe from the evidence that Henry Rayford knew, or had notice that the land described in the complaint was the unperfected homestead entry of Lewis I. Freeland, and said Rayford extracted or caused to be extracted the gum from trees on said homestead

and manufactured the same into spirits of turpentine and rosin; if you further believe that Rayford delivered the said turpentine and rosin to the defendants and the defendants converted the same to its own use, or exercised acts of ownership or dominion over it, such as by appropriating it to the payment of, or a credit upon, any indebtedness due them by said Rayford, or by a sale of such produce by the defendant, that is, a sale by them of the turpentine and rosin received from Rayford if it came from this particular gum—that would be a conversion.” (Rec., pp. 62-66, 86.)

5. (8) The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (a), and which was as follows:

(a) “If you believe from the evidence that Rayford knew, or had notice that the land described in the complaint was the unperfected homestead entry of said Freeland, and that Rayford extracted or caused to be extracted crude gum from trees on said homestead, and manufactured the same into spirits of turpentine and rosin, and if you further believe from the evidence that Rayford delivered said turpentine and rosin to the defendants, or caused it to be delivered to defendants, and defendants converted same to its own use, or exercised acts of ownership or dominion over it, as in either manner I have explained to you, then you should find for the plaintiff for the market value of said spirits of turpentine and rosin at the time same was delivered to defendants, with interest thereon from that time to this date.” (Rec., pp. 62-3, 66, 86-7.)

The portion of the court's charge excepted to in the Third (Seventh) Assignment was erroneous in ignoring the loss of the identity of the goods through the doctrine of accession already argued; also because it ignores the idea that defendant company became a tenant in common with the government, even if the evidence be viewed most favorably to the government; also because the acts referred to occurred before the criminal statute of 1906, before which there was no wrong in boxing such timber, certainly so long as there is no proof that such boxing worked any damages to the trees. See Argument, *supra*. The charge was bad for the further reason that it permitted the jury to find "a sale by them of the turpentine and rosin received from Rayford if it came from this particular gum," when there is no evidence of a sale by the defendants, and particularly there was no evidence that any stuff sold "came from this particular gum."

The charge excepted to in the 5th (8th) Assignment of Error was bad for the same reasons above mentioned, and for the further reason that it fixed the measure of damages at the value thereof at the time the product was delivered to defendants with interest, and *not the value at the time of conversion*, and not, optionally with the jury, any market value at any time between conversion and recovery. This is more fully argued under Assignments of Error Nos. 4 and 9.

Sixth Assignment of Error.

6. (9) The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (c), and which was as follows:

(c) "The boxing of trees by a settler on public land covered by an unperfected homestead entry, or by any person who knew it was public land (which an unperfected homestead entry is), and the extracting of crude turpentine therefrom, constitutes in law an intentional, wilful trespass, although he may have acted without knowledge of the illegality of the act; and from such persons the United States are entitled to recover the value of the produce manufactured from such crude turpentine by the settler or from any person into whose possession the same may have passed." (Rec., pp. 63, 66, 87.)

This charge was erroneous in several particulars.

The charge was given with respect to occurrences in 1904 and 1905 which, by allegation and undisputed proof, took place before the criminal statute of June 4, 1906. There was no evidence to the effect that the boxing operations hurt the trees, and according to the prior utterances the United States Circuit Court of Appeals for the Fifth Circuit (*Bryant* case, 105 Fed. 944), and of the Circuit Court of Appeals for the 8th Circuit (*U. S. v. Waters Pierce Oil Co.*, 196 Fed. 767), such boxing was *prima facie* lawful.

It ignores the doctrine of accession hereinbefore argued.

It further ignores the rights of defendant company as tenants in common and makes the mere *passing into possession* of defendant company the test of liability though defendant had the lawful right of possession thereof.

It ignores the question whether a conversion has taken place as the test of liability, substituting a mere taking of possession as enough proof of guilt.

It gives unlimited right of recovery of the "value of the produce manufactured from such crude turpentine," regardless of circumstances, and regardless of the chemical changes through which it has passed. See our argument on accession, *supra*, and also on measure of damages, *post*, Assignments Nos. 13, 14 and 20.

Tenth Assignment of Error.

10. (13) The court erred in giving the following written charge at the request of the plaintiff:

"If the jury are satisfied from the evidence that the defendant corporation received manufactured turpentine and rosin which had been manufactured by Rayford from crude gum obtained from timber then growing on the land described in the complaint, then in ascertaining the amount of same, they may take into consideration the fact that the wrong of the defend-

ant's vendor, Rayford, in obtaining crude gum from the Freeland homestead and mixing it with other crude gum obtained by him from other land and manufacturing it into turpentine and rosin makes the determination of turpentine and rosin received by the defendants, which had been so manufactured, from gum obtained from the Freeland homestead difficult; and the jury may, in order to determine such quantity, make every reasonable inference which may be drawn from and justified by the testimony, in favor of the plaintiff." (Rec., pp. 66-7, 88-9.)

This is indeed a startling instruction. It imputes to defendant, *who is as innocent as the government of any wrong or knowledge of wrong* in the act of Rayford in mixing government gum with his own lawful crop, the same guilt that would be visited upon Rayford—why? Because defendant is guilty? No; merely because the proof of the government's case *is difficult*. This is the first adjudication that we ever saw that mere difficulty in proving plaintiff's case, changes the burden of proof so that, in view of the difficulty, defendant is presumed guilty instead of having the right to wait till proof is adduced. The rule announced by the charge goes even further than this. It absolutely assumes as a fact proven beyond dispute, the guilt of Rayford instead of leaving that to be ascertained by the jury as a disputed fact, and then imputes the same guilt to defendant, and then caps it off by saying that every reasonable inference may be drawn *in favor of*

plaintiff without hinting that any inferences may be drawn in defendant's behalf. If this charge be not grossly erroneous it is one of those cases, occasionally mentioned, where *difficult cases make bad law*.

Eleventh Assignment of Error.

11. (14) The court erred in giving the following written charge at the request of the plaintiff:

“The court charges the jury that if they believe from the evidence that the defendants obtained any rosin which had theretofore been manufactured by Rayford from crude gum obtained from the Freeland homestead and are unable to determine from the evidence the various grades of rosin so manufactured and the amount of each grade so obtained, they may find for the plaintiff for the average grade so obtained, if they can ascertain such average grade from the evidence in the case, and if they cannot from the evidence reasonably determine such grade they should find for the plaintiff for the value of the lowest grade of rosin.” (Rec., pp. 67, 89.)

If this charge be held proper it goes a little further than the last and is a case where a difficult case makes *worse law*. It is the *cy pres* doctrine applied to the burden of proof. It says to the jury in effect if the plaintiff has not proven its case as alleged, do the best you can for plaintiff and give it something else than that which it would be entitled to had it proven a case. Though the law is firmly

settled that a "quotient" or average verdict is erroneous and will be set aside and the rendition of one is misconduct by the jury, when the jury agrees to decide the case that way before arriving at the verdict,

Southern Ry. v. Williams, 21 So. Rep. 328;

113 Ala. 620;

29 Cyc, 812-3;

29 A. & E. Enc. Law (2 ed.) 1007,

this charge instructs the jury to average their views and give a verdict accordingly. It goes further. It instructs the jury not merely to average their individual convictions, as the usual quotient verdict does, but to average their *lack of convictions*, by taking the various grades they are *not reasonably satisfied about* and average them; then, if under their oaths and consciences they cannot do that, they should find for plaintiffs upon the basis of the lowest grades; and this, although the jury may be firmly satisfied from the evidence, that defendant did not get a pound of the lowest grade stuff ever manufactured from government gum.

This charge is erroneous for the further reason that it is an invasion of the province of the jury. The credibility of the testimony is solely for the jury. Some of the estimates may be credible in the belief of the jury and others so utterly untrustworthy as to be rejected by the jury. The jury may accept some and reject the others, yet this charge instructs the jury to treat all as equally credible

and use the *average of all* as the basis of verdict. This is contrary to the well known principle that the jury should reconcile the testimony, if practicable; if not capable of being reconciled they should accept that they deem most trustworthy and reject that not deemed worthy of acceptance as a guide.

The Supreme Court of Kansas has decided this identical point, saying:

“Although a court might be justified in refusing to set aside a verdict made upon the average theory, it does not follow that a court would be authorized to suggest such mode by an instruction. *Thomas v. Dickinson*, 12 N. Y. 364; *Allard v. Smith*, 2 Metc. (Ky.) 297; *Bailey v. Beck*, 21 Kan. 462; *Johnson v. Husband*, 22 Kan. 277; *Werner v. Edmiston*, 24 Kan. 147; *City of Kinsley v. Morse*, 40 Kan. 588, 20 N. W. [Pac.] Rep. 222.”

—*Kansas City, Etc., Co. v. Ryan*, 30 Pac. 108, 110 (Kan.).

It is a mathematical certainty that one cannot state the “average” of certain numbers unless he knows the factors making up the average. It is equally and mathematically certain that no jury could state the “average” or mean grade of a given product without knowledge of the grades, both higher and lower, that make up the average.

This charge is upon a wholly false basis. The first year’s working from these government lands produced a certain commodity and nothing else. The same may be said of the second and third

years' working, if any. What Rayford got from other lands is no criterion. It might, conceivably, be persuasive to compare these lands with other similar lands, and by showing similarity of working conditions ascertain by comparison the product probably gathered. But never can the difficulty of the case, or the unwillingness of the government to try a fairer or better method of proof, permit a "splitting of the difference" between unshown grades and unknown quantities, as a substitute for that proof of reasonable certainty that the law requires. The jury should be *reasonably satisfied* of the thing they find or imply by their verdict. They should not be invited to substitute a verdict for a lesser amount upon an unproved hypothesis, because the government is willing to take a smaller verdict than it hoped, but failed, to prove. This charge is merely a powerful invitation to come to an erroneous, because unproven, conclusion, upon the assumption that "it might have been worse." If the evidence justifies submitting the question whether plaintiff may recover more than the minimum verdict thus invited, it should be courageously submitted and the issue abided.

In order to find for plaintiff *upon the evidence*, the jury must be satisfied of the quantity of gum that came from this government land and was manufactured and was converted by defendant. Then it must be satisfied as to the grade to fix the price. They ought not to substitute for such necessary

reasonable conviction from the evidence, the mere satisfaction that they are giving the government a verdict which it did not prove and are mulcting the defendant in the least possible sum consistent therewith.

Eighth Assignment of Error.

8. (11) The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (*e*), and which was as follows:

(*e*) "The plaintiffs contend that the fact that Rayford had a contract with the defendants to deliver to it all the turpentine and rosin manufactured, or otherwise obtained by him during the time covered by the contract, and the fact that Rayford during that time, at least the years 1904 and 1905, worked the said homestead or a part of it and obtained crude gum therefrom to manufacture turpentine and rosin, and caused to be hauled or did haul any of this crude gum from said homestead to, or in the direction of, the still operated by Rayford, and that spirits of turpentine and rosin were manufactured at that still, and all of it was shipped to the defendants at Mobile, and the bills of lading were sent by Rayford to the defendants of such shipments, and a large amount of turpentine and rosin was received by the defendants from Rayford during the season said land was worked by him (I believe that is shown by the paper furnished by the defendants), and that accounts of sales were furnished to Rayford showing the amount of proceeds

and the disposition of the same, to some extent at least, it not being fully shown by the evidence as to the disposition; and they further contend that the fact that there is evidence showing or tending to show that Rayford shipped to no one else during that time—plaintiffs contend that all these facts and circumstances should be considered by you in determining whether or not the defendants received the turpentine and rosin manufactured by Rayford from gum obtained from said land; and they further contend that these facts and circumstances are established by the evidence in the case, and that they are sufficient to reasonably satisfy you that the said turpentine and rosin came into defendant's possession and were converted by it.

The defendants take issue with the plaintiffs as to these contentions and insist that they are wholly insufficient and that you should not give such weight to them as they claim for them.

Now, if you find these facts and circumstances have been shown by the evidence in this case, you may properly, and you should, consider them in determining the issues in the case, and give to them such weight as in your judgment is fair and reasonable." (Rec., pp. 64-5, 66, 87-8.)

We do not quarrel with the principle that the issues may be proven by circumstantial evidence, but the evidence must be such as to carry reasonable conviction, and not merely afford an opportunity for prophecy or guesswork. The evidence does not show that all stuff shipped by Rayford reached

the defendant, or was accounted for. The only evidence upon which the government bases its claim that the defendant got all Rayford shipped, is the testimony of Rayford's son on record p. 22. Everything young Rayford testified might be absolutely true, and a dozen carloads of stuff shipped by Rayford may never have reached defendant in any form.

The court seems to think, and gives the jury leave to infer, that because defendant company had a contract for all, so it must have received all Rayford produced, perhaps upon the equitable maxim that *the law* (not equity alone) presumes the doing of that which ought to be done. Does not that presumption work both ways? The contract expressly agrees that Rayford will not require any gum from government lands. Will not compliance with that covenant be also presumed? And we have the benefit of still another presumption, applied both at law and in equity, the presumption of compliance with the law, rather than a violation of it. The court's charge is out of harmony with this principle also.

Fourth and Ninth Assignments of Error.

4. (7 1-2) The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (*b*), and which was as follows:

(b) “and if you find that to be so, then you should find for the plaintiffs for the market value of such spirits of turpentine and rosin at the time that the same was delivered to the defendants, with interest thereon from that time to this day.” (Rec. pp. 62, 86.)

9. (12) The court erred in giving that portion of its oral charge which is in black letters and designated with the letter (f), and which was as follows:

(f) “If you are so reasonably satisfied, then the plaintiffs are entitled to recover from the defendants the value of such turpentine and rosin at the time it was received by the defendants, with interest thereon to date.” (Rec., pp. 65-66, 88.)

These assignments show the trial court to have been in error in stating the rule of damages. The delivery to defendant was not the time of conversion. The conversion of manufactured product, if any, consisted of the sale or other disposition of the property. We do not think there was enough evidence of any such sale or disposition, but the court submitted it to the jury. The sales, if made, were at a later time, how much later is not shown. The charge should have been that the damages were the value at the time of the *conversion*, whenever that was.

We have seen that values of such products fluctuate from day to day. We have also seen that the defendant had the right to possession, even if

it be a tenant in common, so that its taking possession was rightful. The conversion, if any, was the later disposition thereof to the exclusion of the plaintiff, so that the doctrine of these charges is utterly wrong.

The trial court assumed, and the brief for the government in the Circuit Court of Appeals persistently declares, that *Rayford* was a willful trespasser and that the measure of damages should be instructed accordingly. In this, we respectfully contend, there was vital error. The evidence shows without conflict that when *Rayford* worked those lands for turpentine, he did so under the *bona fide* belief that he had a right so to do. *Freeland* testified that "Rayford told him that there was no law against turpentinizing homesteads" (Rec. p. 17) and the authorities above cited give excellent support for the *bona fide* belief that there was no wrong in so doing. The vice in the government contention, and the trial court's erroneous assumption, is that because *Rayford* knew that this was an unproved homestead that he also knew that it was against the law to turpentine it; this is doubtless based upon an erroneous application of the maxim that every man is conclusively presumed to know the law. The true application of the maxim is that every man is presumed to know the law to such an extent that he may be held responsible for, and required to compensate another for an injury done such other, and as against this measure of responsibility no

plea of ignorance of the law will avail. BUT THIS MAXIM HAS NEVER BEEN APPLIED TO PUNISH HIM BEYOND THAT MEASURE FOR NOT KNOWING THE LAW.

“If the defendant went upon the land and cut and removed the timber in good faith, believing that he had a right thereto, he was only answerable in damages for the stumpage value thereof and not for the manufactured value. This is the universally recognized rule of law, and has been so applied to alleged trespasses under this statute.”

- Morgan v. U. S.* 169 Fed. 249 (8th CCA.)
- Gentry v. U. S.* 101 Fed. 51 (8th CCA.)
- U. S. v. Gentry*, 119 Fed. 70 (8th CCA.)
- U. S. v. Van Winkle*, 113 Fed. 903 (9th CCA.)
- U. S. v. Homestake Min. Co.*, 117 Fed. 481 (8th CCA.)

We therefore respectfully contend that independent of the time when the rights of the defendant-appellant company attached to the property, upon the evidence in this case, *even* as against Rayford himself, the measure of damages should have been compensatory merely and not in any wise punitive because of his *bona fide* belief (even if mistaken therein) as to his right to do the acts complained of.

In the case of *Bryant v. United States*, 105 Fed., 941, the Circuit Court of Appeals for Fifth Circuit said:

“We think it is not a matter of common knowledge that such cutting and boxing of pine trees destroys the value of the trees as timber, or that it has a tendency even to retard the growth of the trees. It is, however, we think, a matter of common knowledge, of which we may take notice, that on March 2, 1831, and long before that date, the ‘turpentine business’ was an industry most prevalent in all the parts of the country where there were pine-growing public lands; and if it had been the intention to protect these public lands from the ravages of that business, it would have been easy to make that intention clear by the use of appropriate words.”

The only reply that the counsel for the government made to the proposition that the turpentering of the timber upon the homestead was not wrongful, is, that that was a criminal case, and that it did not preclude the idea that the conversion, while not criminally wrongful, might still amount to a trespass. To say the least of it, however, the statement by the court of appeals, which we have just quoted, was certainly calculated to imbue the layman with the understanding that he was doing no wrong in turpentering the government homestead, and Mr. Rayford declared this to be his understanding at the time of the transaction, as appears from the testimony. We, therefore, deny that Mr. Rayford was, in any sense, a wilful trespasser. We submit that his understanding of the law was correct, but whether it was so or not, the fact that

he acted in good faith upon a reasonable construction of an opinion that had been rendered by the court of appeals, ought certainly to protect him from being denounced as a wilful trespasser, or as a turpentine thief. The doctrine which entitles the government to recover the increased value in manufactured rosin and turpentine over the crude, is based entirely upon the idea of punishing a wilful wrong-doer and this doctrine can have no reference to the man who acts upon an honest belief as to his legal rights, even though he may be mistaken as to the law. The distinction, which we rely upon, has been aptly stated by the Circuit Court of Appeals for the Eighth Circuit, in the case of *U. S. v. Homestake Min. Co.*, 117 Fed., 486, as follows:

“The question then is, did the trespasser violate the law, which he constructively knew, recklessly, or with an actual intent to do so, and to take an unconscientious advantage of his victim, or did he violate it inadvertently, unintentionally or in the honest belief that he was exercising his own right? If the former, he was a wilful trespasser, and the value of the manufactured timber or the extracted ore measures his liability. If the latter, he was an innocent trespasser, and the value of the *wood in the tree* or of the *ore in the mine* is the limit of his indebtedness. The test to determine whether one was a wilful or an innocent trespasser is not his violation of the law in the light of the maxim that every man knows the law, but his honest belief, and his actual intention at the time he committed the trespass; and

neither a justification of the acts nor any other complete defense to them is essential to the proof that he who committed them was not a wilful trespasser. *Durant Min. Co. v. Percy Consol. Min. Co.*, 93 Fed. 166, 168, 169, 35 C. C. A. 252, 254; *Gentry v. U. S.*, 101 Fed. 51, 54, 41 C. C. A. 185, 188; *U. S. v. Van Winkle*, 51 C. C. A. 533, 113 Fed. 903, 905."

But even if we are wrong in supposing that the undisputed testimony shows that Rayford acted upon a misapprehension as to the law, it is at least certain that the question as to whether he did so or not should have been left to the jury, and that the court, therefore, erred in assuming, as it did throughout its rulings and charges, that Rayford was a wilful trespasser.

We, therefore, respectfully submit that Mr. Rayford was not a wilful trespasser, and that the measure of damages, even as against him, should, therefore, have been the value of the crude turpentine as it was taken from the trees, and that no recovery could properly be had against the plaintiff in error for the increased value upon the ground that they had purchased the property from a wilful trespasser. If we are correct in this single argument, the result must be conclusive that the court erred in each of the rulings which are referred to in the Assignments 7 1-2, 12, 25, 26 and 41 in Court of Appeals, Assignments 4, 9, 13, 14 and 20 in this court.

Fifteenth and Sixteenth Assignments of Error.

15. (27) The court erred in refusing the written request of the defendant to charge the jury as follows:

“The court charges the jury that no one is bound to assume, in ordinary commercial transactions, that a party with whom he deals is a wrong-doer, and if such party with whom he deals presents property for sale, the title to which is apparently valid, and there are no circumstances disclosed or known by the purchaser which casts suspicion upon the title of the seller, he may rightfully deal with such seller, and if he pay full value of the same, acquire the rights of a purchaser in good faith.” (Rec. pp. 72, 92-3.)

16. (31) The court erred in refusing the written request of the defendant to charge the jury as follows:

“The court charges the jury that it is the law that one who enters into an ordinary and reasonable contract for the purchase of property from another need not presume that the seller is a wrong-doer, nor must he make a search inquiring as to the validity of the seller's claim to the property.” (Rec. pp. 74, 93.)

These charges are literal excerpts from the opinion of this the United States Supreme Court, speaking by Mr. Justice WHITE, in the case of

U. S. v. Detroit T. & L. Co., 200 U. S. 331-2, 50 L. ed. 503.

For the rule to be otherwise, "would shake the foundations of commercial business," as the learned justice further observes on page 332.

The charges state good law, applicable to the case, and should have been given.

The following is a literal excerpt from the brief of the government in the Court of Appeals on these assignments:

"The court properly refused the charges which formed the basis of the twenty-seventh and thirty-first assignments of error, because they were misleading. *There was no contention on the part of the government that the Union Naval Stores Company was anything but an innocent purchaser from a willful trespasser.* The charges in question contain good law, but they are abstract and state propositions not involved in the case on trial. If the government had contended that the Union Naval Stores Company was a knowing purchaser, they might have been applicable."

Unless the integrity of the law or its policy would be imperilled by ruling otherwise, must a confessedly innocent defendant be mulcted in the highest measure of damage, as vicarious punishment for the sins of another, whose acts the government saw fit to overlook for all his natural days?

**Thirteenth, Fourteenth and Twentieth Assignments
of Error.**

13. (25) The court erred in refusing the written request of the defendant to charge the jury as follows:

“The court charges the jury that there is no evidence in this cause as to the value of crude turpentine, and if the jury believe from the evidence that the Union Naval Stores Company obtained the right of possession of the crude turpentine taken from the homestead in question without any knowledge of the fact that it had come from lands of the United States government, but under the *bona fide* belief that it had been taken from private lands, then the jury cannot find for the plaintiff for more than one cent.” (Rec. pp. 72, 92.)

14. (26) The court erred in refusing the written request of the defendant to charge the jury as follows:

“The court charges the jury that if they should find a verdict for the plaintiff, and believe from the evidence that the defendant did not know that the property so converted was taken from lands of the United States, and if the jury further believe from the evidence that moneys advanced by the defendant to Rayford were used by Rayford for the purpose of defraying the expenses of distilling and transporting the same, the measure of damages would be the value of the crude gum when severed from the trees in the woods at the time and place when said gum was originally converted by those who took it from government lands, and not

the value after being transported or after being manufactured into more valuable product." (Rec., pp. 72-73, 92.)

20. (41) The court erred in refusing the written request of the defendant to charge the jury as follows:

"The court charges the jury that if they should find a verdict for the plaintiff in this case, and if they believe from the evidence that moneys advanced by the defendant to Rayford were used by him for the purpose of paying the expenses of distilling the crude gum taken from government lands, and for the purpose of shipping same, the measure of damages against this defendant would be the value of the crude turpentine in its original state when originally taken from the trees and not the value of the manufactured product after it was manufactured or improved by distilling it." (Rec., pp. 77-8, 95-6.)

These requested instructions lay down the proposition that, under one aspect of the evidence, the recovery, if any, should be limited to the value of the crude gum, and there was no attempt to show such value. The evidence showed without conflict that the defendant had its mortgage on the crude gum acquired by Rayford from all but government lands, and that the government crude, if any was taken by him, was inseparably mixed with the non-government crude, in its crude state; that the business was always in debt to defendant company which advanced Rayford the funds with which to

run his business. These facts in the case at bar, bring it within the influence of the case of

Fisher v. Brown, 70 Fed. 571,

decided by the Circuit Court of Appeals for the Sixth Circuit, composed of Judges TAFT, LURTON and SEVERENS. That court said:

“The question here is how these rules are to be applied to a case where an innocent purchaser from the wilful trespasser, in anticipation of an absolute purchase, and on the faith of a good title to the property in his vendor, advances money to expend in improving its value, and to be credited on account of the purchase money, when the property is delivered in its improved condition, and takes from the vendor a transfer of title to the property in its unimproved condition, pending the completion of the contract, to secure the advances thus made. Under such circumstances, we think the measure of damages should be fixed as of the time when the first advances were made by the innocent purchaser, to be expended in adding to the value of the property. The *rule* which forfeits to the owner the added value conferred by the labor and money of the trespasser is a *punitive one*, and should *not* be made to apply to the innocent purchaser where it can be *avoided*. In the *Wooden-Ware Co.* case, it could not be avoided, because when the purchaser paid his money to his vendor, that which he bought belonged, increased value and all, to the person from whom it had been tortiously taken. In this case, however, the defendants advanced money for the very purpose of giving the property added value, when

it was still in the shape of logs, and secured a transfer of title at the time. We think justice requires that we should treat the case as if the purchase had taken place when the logs were on the skids, and the accession in value had been the result of the defendants' expenditure thereafter. In this view of the case, the jury should have been instructed to measure the damages by the value of the logs tortiously taken on the skids, and not that of the cut lumber on the rail at Marquette."

In the later case of

Powers v. United States, 119 Fed. 562, 567,

the same court, composed of Judges LURTON, DAY and SEVERENS, said:

"The rule laid down in the case of *Bolles Wooden Ware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. ed. 230, and which has ever since been followed in the federal courts, was this: when the defendant is a wilful trespasser, the plaintiff is entitled to recover the full value of the property at the time and place of demand or of suit brought, with no deduction for his labor and expense. But when the defendant is an unintentional or mistaken trespasser, or an innocent vendee from such trespasser, the value at the time of conversion, less the amount which he, or he and his vendor, have added to its value, constitutes the measure of damages. Later cases, where this rule has been followed and applied, are: *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U. S. 428, 12 Sup. Ct. 877, 36 L. ed. 762;

U. S. v. Mock, 149 U. S. 273, 13 Sup. Ct. 848, 37 L. ed. 732; *Fisher v. Brown*, 37 U. S. App. 407, 17 C. C. A. 225, 70 Fed. 570; *Gentry v. U. S.*, 41 C. C. A. 185, 101 Fed. 51; *U. S. v. Van Winkle*, 51 C. C. A. 533, 113 Fed. 903."

Following the *Bolles Wooden Ware* case, the Circuit Court of Appeals for the Eighth Circuit, said:

"The measure of damages for the conversion of property by an innocent purchaser from an intentional trespasser is the value of the property at the time of the purchase."

—*Potter v. U. S.*, 122 Fed. 53.

The underlying principle and logic of these decisions is that while the actual wrongdoer (in this case, Rayford), may be liable for the highest value up to time of judgment, an innocent purchaser, from even such an one, can only be held liable for the time of the purchase or other inception of his rights. The innocent purchaser is not punished for a later higher market value, because he personally merits no punishment at all, though the trespasser might be; nor, ordinarily, for reasons stated in the *Bolles Wooden Ware* case, may the innocent purchaser have the benefit of escape at the value of the crude *before the purchase*, but the valuation is kept within the time limits of the purchaser's connection with the goods. It is the stern necessity of public policy that makes the innocent purchaser liable at all, which public policy is stated in this excerpt from the opinion in the *Bolles* case:

“To hold that when the government finds its own property in hands but one remove from these wilful trespassers, and asserts its rights to such property by the slow process of the law, the holder can set up a claim for the value which has been added to the property by the guilty party in the act of cutting down the trees and removing the timber, is to give encouragement and reward to the wrongdoer, by providing a safe market for what he has stolen and compensation for the labor he has been compelled to do, to make his theft effectual and profitable.”

The same case recognizes the propriety of protecting the innocent purchaser after the inception of his rights by using the following language:

“On the other hand, the weight of authority, in this country, as well as in England, favors the doctrine that, where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern, or, if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition. * * *

“If the case were one which concerned additional value placed upon the property by the work or labor of the defendant after he had purchased, the same rule might be applied as in case of the inadvertent trespasser.”

The *Fisher-Brown* case, decided by Judge TAFT, is but a logical and common-sense application of that rule. If the innocent buyer takes con-

tractual rights in the property *before its improvement*, through his advances of cost to make the improvements, and has a lien upon the *unimproved* property therefor, his purchase is considered to be of the unimproved property, and it is the value of *that* which furnishes the measure of damages against him. In this way are the decisions entirely reconcilable. On any other basis the views of Judges LURTON and DAY must be deemed in conflict with the views of the Supreme Court. As the decisions are thus reconciled, the rights of the defendant company attached under its mortgage, as *quasi-purchaser*, to the crude product, before it was manufactured, and the date of its purchase must be reckoned as of the time when its rights attached to the crude. Hence, the measure of damages would be the value of the crude, not including the value of the improvement made by defendant's money, applied by Rayford after defendant's rights attached.

The government brief below ignored the rights of the defending company under its mortgage whose lien attached to the crude turpentine lawfully acquired by Rayford as soon as he acquired it, and continued to adhere to it so long as it was in Rayford's possession, either in crude or in manufactured form. (Rec., pp. 31-38, particularly p. 34). It was clearly the contemplation of the mortgage and contract that all such crude gum should be manufactured with advances furnished by defendant com-

pany. Therefore the facts of the case bring it directly within the influence of the *Fisher* above cited.

The mortgage clearly gave the company the rights of an owner or quasi-owner, with a lien thereon, and, at least under some circumstances, entitled to the possession thereof.

Rayford was without right or authority to do anything that would deprive it of that lien and right to possession, and the admixture of government gum therewith could not have that effect as between the company and Rayford. *As between the company and Rayford*, the company was the owner of the goods, and if an admixture was effected of such nature that there could be no tenancy in common because the goods were not all alike, the larger part absorbed the lesser part under the doctrine of accession. The defendant company stood in the relation of a *bona fide* purchaser as to the goods from the inception of its mortgage lien. It never had any lien on the government crude gum so long as it remained separate, because Rayford could not give any and its contract expressly excluded any such. But as soon as the goods were confused by Rayford, the lien of the company attached to the commingled mass and if this lien had been acquired in good faith, the company would not be punished by an award of punitive damages for insisting thereon.

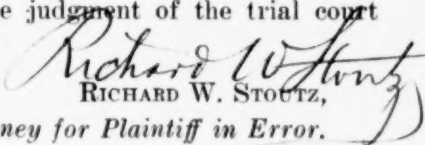
It may be said plausibly that under the evidence in this case that it does not appear conclu-

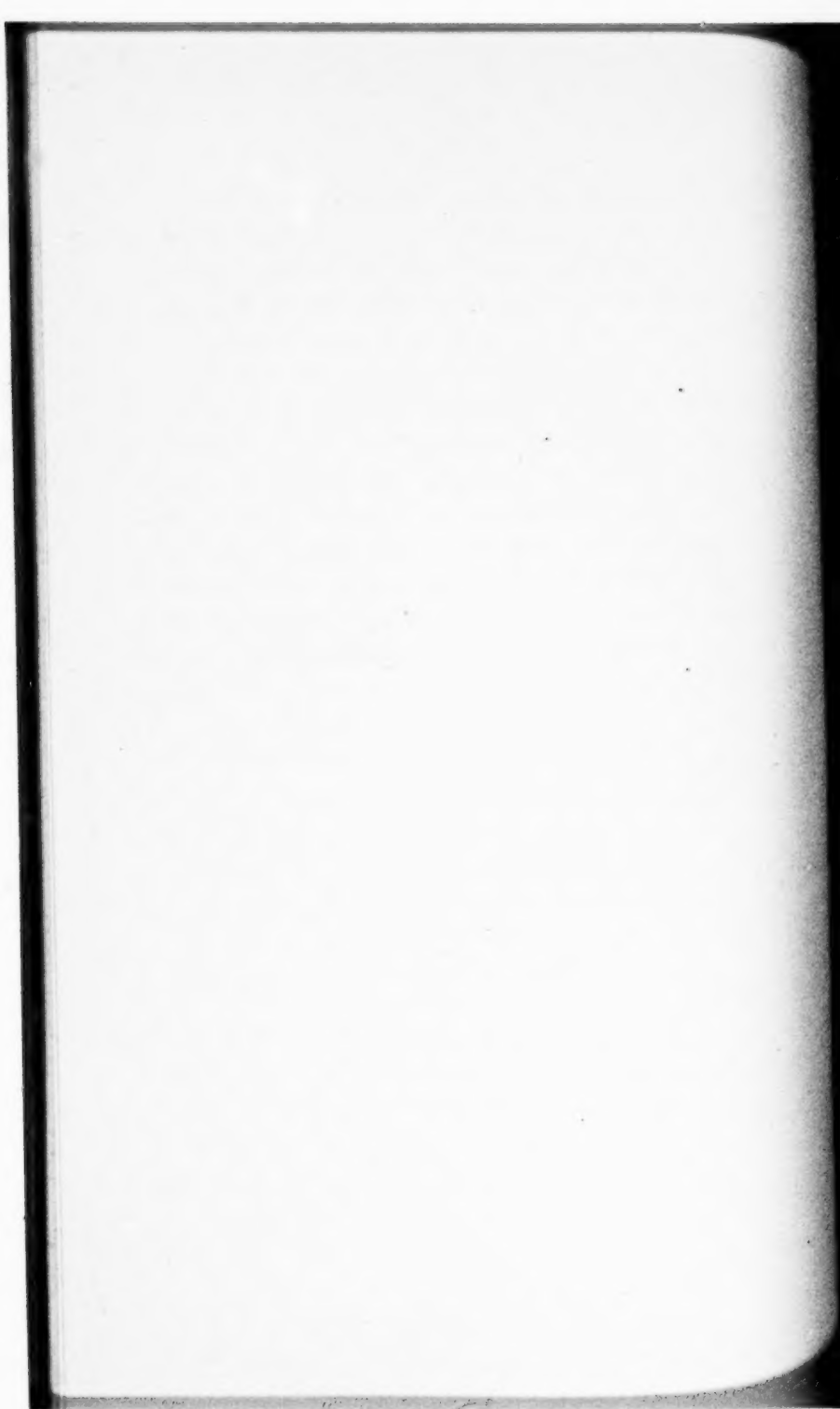
sively either that Rayford acted *bona fide* in the belief that he had a right to work the trees for turpentine, or that he acted *mala fide* with full knowledge of the illegality of his acts. While we think every fair inference from the evidence is in favor of his *bona fides*, it is certain that the evidence is not conclusively against our contention, and the most that can well be claimed for the government is that it was for the jury to say whether he acted *bona fide* or otherwise. If it was for the jury, the charges as to the measure of damages given by the court were clearly erroneous in foreclosing any consideration of his *bona fides* and instructing outright he was a wilful trespasser, and they should require a reversal of the case.

First and Second Assignments of Error.

These assignments complain of the refusal of the Circuit Court of Appeals to reverse the trial court. The merits of these two assignments are of necessity involved in the discussion of the more specific assignments in the argument, all of which is adopted as the argument to these two assignments.

For the errors herein mentioned, we respectfully submit that the judgment of the trial court should be reversed.


RICHARD W. STOUTZ,
Attorney for Plaintiff in Error.



In the
SUPREME COURT OF THE UNITED STATES.

No. 80, October Term, 1915.
(No. 377, October Term, 1914.)

UNION NAVAL STORES CO., - Plaintiff in Error,

vs.

THE UNITED STATES, - - - Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF AP-
PEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

We had not purposed filing a reply brief for plaintiff in error, but the brief for the government contains two or three matters so unfair that a short reply seems necessary.

6th (9), 17th (34), 19th (36), Assignments of Error.

On page 11 of the government's brief it is suggested that the hypothesis of innocence is "quite

too absurd for serious consideration.” This relates to the innocence of Rayford, the turpentine operator. Rayford was dead at the time of the trial. His acts must be judged from the surrounding circumstances and contemporaneous declarations. A witness testified to Rayford’s belief that it was not unlawful to do the work he did (see Rec., p. 17). In all other respects his business was conducted in the usual open manner in which such business is usually and lawfully conducted. There was no evidence or any other circumstances of guilt or illegality, and the presumption of lawful methods must be indulged when the operations are similar to general legitimate business. It was a question for the jury, at least, to say whether Rayford was innocent or was knowingly guilty. The court foreclosed any such inquiry by the jury, by charging that he was a wilful trespasser and that is one of the errors complained of. The government’s argument in this court suggesting, on page 20 of their brief, that he went ahead “recklessly and wantonly” is hardly legitimate before the jury, but is certainly out of place here.

On page 25 the government declares the bill of exceptions “does not contain, and is not certified to contain, all the evidence.” This is either inexcusably unfair, or honest oversight. The record, on page 60, states, after both parties had rested: “*This was all the evidence in the case.*” The point is made that two certain pages from the tract book were noted in evidence, page 60, but do not appear. The truth is,

that the government "offered" these pages but neither read them nor produced copies, and the land office people took the books away and they were not thereafter available. They could not possibly show anything further than to have a bearing upon the matter of the description of the land concerning which they were introduced.

Defendant's Status as Mortgagee.

On page 29 of its brief the government sees fit, without any justification, to call the factorage contract existing between the Union Naval Stores Company and Rayford a "cut-throat contract," and it is suggested, on page 47, that their purpose was monopoly, and it is suggested, on page 49, how the Union Naval Stores Company could possibly use this kind of contract as a deceptive means of aiding and abetting such operations and avoiding liability. These suggestions are unfair and unworthy, in view of the fact that the trial court and the court of appeals both expressly declare that the company was innocent of any culpability whatever; there was not a scintilla of evidence in the case in any wise suggesting even the shadow of guilt. The rules of evidence and of procedure in the courts are flexible enough to reach the guilty without having overzealous prosecutors denounce legitimate business because the methods of legitimate business *might possibly* be used for improper purposes. If that practice should prevail, all legitimate business concerns would be denied the use

of the mails because illegitimate enterprises occasionally conduct swindles by similar use of the mails. The contract between the Union Naval Stores Company and Rayford was only the customary factorage contract which carries no benefits to the company except the opportunity of handling Rayford's product for a commission as a compensation, and lawful interest on advances made. Inasmuch as the company was carrying the financial burden it was proper to secure the advances by mortgage, and until the practice of giving mortgages is outlawed entirely, the propriety of taking the mortgage in this case cannot well be assailed.

On page 54 of the government's brief the point is made that the details of the indebtedness in the account between the defendant company and Rayford were not shown. The rights of the company are based upon the proven *fact of indebtedness* and its rights as mortgagee. If the present suit had been a foreclosure or to recover a personal judgment against Rayford or his estate, the details would have been material.

On page 51 of its brief the government distorts the relations between Rayford and the defendant company to the extent of declaring that when Rayford was handling his own business he "was carrying on the business of the company no less than his own," and from this unsound premise draws the conclusion that the company must be blamed for Ray-

ford's tort in admixing the gum taken from government land with that taken from confessedly-private lands. It is a novelty in the law of agency to declare that the taking of a mortgage for purposes of security renders the mortgagee liable as tortfeasor, if the mortgagor, in violation of his contract, acts improperly towards the mortgaged property. Unless the government produces something having the semblance of authority, we submit that the mere fact of taking a mortgage does not make the mortgagor the agent of the mortgagee for the purpose of holding the mortgagee responsible for the torts of the mortgagor.

The Doctrine of Accession.

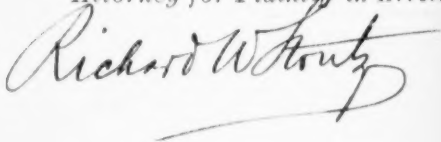
Quite in line with the last contention of the government is the very erroneous statement, on page 52 of the government's brief, that "there is no warrant for the statement many times made in the opposing brief, that the rosin owned by the government was less in quantity than that with which it was mixed." The record shows overwhelmingly the truth of the statement in the brief of plaintiff in error thus attempted to be discredited in the government's brief. The record shows, on page 43, the testimony of Fred Hoisington, the government's most able witness, whose "post mortem" estimate was the most favorable to the government. He testified that, in his opinion, 8,750 boxes were on the 175 acres of the Freeland homestead. No other witness testified to as much.

Freeland testified, on page 17: "Mr. Rayford had a lot of other turpentine boxes around my neighborhood. I think he had 13 crops each containing 10,500 boxes. These crops I speak of were on other lands than my homestead." On page 19, A. P. Rayford, a son of the Rayford whose acts are questioned, testifies: "We had 20 crops, and you generally count 10,500 to a crop." A. P. Rayford was his father's bookkeeper and accountant, keeping a record of the volume of his business. According to all the testimony, there *was less than one "crop" on the Rayford lands, and the uncontradicted testimony shows that Rayford operated in his whole operations from 13 to 20 times as many boxes as he had on the Rayford homestead.* The entire government's case is based upon the assumption of uniformity of operations and productivity, so that if their theory is to be applied, the only fair inference is that the quantity of non-government gum was tremendously preponderant over that taken from government land. It is therefore suggested that the government's observation on this point is based more on a desire to be severely critical than upon accuracy of analysis.

We consider all other points sufficiently argued in our principal brief, and respectfully submit that the judgment appealed from should be reversed.

RICHARD W. STOUTZ,

Attorney for Plaintiff in Error.

A large, stylized handwritten signature in dark ink, which appears to read "Richard W. Stoutz". The signature is written in a cursive style with a long, sweeping underline.

UNION NAVAL STORES COMPANY v. UNITED STATES.
No. 80.

Errata.

On page 25 of this brief it is said that the bill of exceptions does not contain, and is not certified to contain, all the evidence. A recital in the record (p. 60), which somehow escaped most careful search, proves this statement erroneous. I am indebted to opposing counsel for exposing this regrettable mistake in his reply brief, and hasten to provide this means of advertising it at the beginning of the brief in which it occurs.

The recital that the bill contains all the evidence makes necessary the elimination of what is said on page 25, and also page 2, of this brief, concerning the pages of the tract book which were "offered" in evidence but not included in the bill.

On page 57 the words "delivery" (line 16) and "conversion" (line 17) should be transposed.

ERNEST KNAEBEL,
Assistant Attorney General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

UNION NAVAL STORES COMPANY, PLAINTIFF
tiff in error,
v.
THE UNITED STATES.

No. 80.

*IN ERROR TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FIFTH CIRCUIT.*

BRIEF FOR THE UNITED STATES.

STATEMENT.

[Opinion of court below reported in 202 Fed. 491.]

The statement made by plaintiff in error will here be supplemented, merely, to repair certain errors and omissions.

The complaint charges a conversion by the company of spirits of turpentine and rosin "taken" from the lands described. There is no allegation that the property was taken from the lands by the company itself. (Cf. opposing brief, p. 1.)

The opposing brief (p. 2) contains inaccurate statements concerning the description of part of the

lands. The homestead papers show that, as originally applied for, the land in section 29 was described as "SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and S. $\frac{1}{2}$ of fraction B" (R. 14), and that this was later amended pursuant to instructions from the Land Department to read "S. $\frac{1}{2}$ of lot No. 3 and S. $\frac{1}{4}$ of lot No. 4" (R. 5). There was merely a change in the way of describing the same land, and the other evidence, to which we will refer in the argument, abundantly establishes that the two descriptions meant one and the same thing. The pages from the land office tract book which were put in evidence (R. 60), but which do not appear in the record, would very likely have explained the situation more clearly.

On page 3 of the opposing brief it is stated that there was evidence that during the years 1903 and 1904 a crew of men, who were then working for Rayford, boxed the pine trees on some of the land identified by surveyor as the Freeland homestead, except about 40 acres thereof, *and gathered crude gum therefrom*. The evidence showed that the land was boxed in 1903 and that the gum was extracted in 1904 and 1905. The boxing season is in the winter, and it is a common custom to box trees, say, in December of one year in order to obtain the crude gum the following spring and summer. Sometimes this boxing is done in December of the calendar year preceding the operations, and sometimes it is done in January and February of the calendar year during which the

crude gum is obtained. There is no evidence that crude gum was obtained in 1903.

The testimony in reference to the Richard Hubbard boxes is to the effect that they did not include the 40 acres of the Freeland homestead in section 33, but that they did include the rest of the homestead and 40 acres more lying north of it (R. 51). The witness, Owen (R. 46), testified "that the Richard Hubbard boxes approximated about 50 to the acre."

The testimony of Fred Hoisington (R. 42) is that there was an average of 50 boxes to the acre on the Freeland homestead, which he surveyed and on which he examined the boxes.

It, therefore, appears that the average of the Richard Hubbard boxes *was the same* as the average of the Freeland homestead boxes.

The deed of trust executed by Rayford to the Union Naval Stores Company on the 21st of December, 1903 (R. 31 to 35), described in the leases which were assigned by Rayford to the Union Naval Stores Company, the following lands: "Fraction B, all in section 29, all in T. 5 S., R. 4 West." This is a portion of the land described in the complaint.

In the contract between Rayford and the Union Naval Stores Company, dated December 21, 1903 (R. 25, *et seq.*), Rayford contracted and agreed with the Union Naval Stores Company that he would cut boxes upon the pine trees on the land described in the said deed of trust. He, therefore,

specifically contracted to cut the boxes on fraction B of section 29. He agreed in this contract to manufacture such crude turpentine into manufactured turpentine and rosin, and, in the third clause, to deliver the same to the Union Naval Stores Company. The contract also provided in the third section thereof that he would ship all the manufactured turpentine and rosin that he produced, or otherwise obtained, during the existence of said contract, to the Union Naval Stores Company.

After the crude gum was manufactured into turpentine and rosin, it was delivered to the Union Naval Stores Company, which converted it to its own use. This is shown as follows:

1. By the contract and deed of trust already referred to. Under the terms of the deed of trust the Union Naval Stores Company had a mortgage on all the crude resin and all the turpentine and rosin manufactured by, or coming into the possession of, Rayford. Under the terms of the contract Rayford agreed to ship all turpentine and rosin which he manufactured, or which came into his possession, to the Union Naval Stores Company. There is a presumption, of course, unless refuted, that Rayford carried out his contract.

2. The written admission of the Union Naval Stores Company (R. 39, 40) that, from April, 1904, to December, 1905, quantities of turpentine and rosin greater than the quantity claimed in the complaint, were obtained by it under the mortgage and contract.

True, it did not admit that any part of the turpentine and rosin came from the lands described in the complaint, but it did further admit that it did not know what land any of it came from.

3. The testimony (R. 19 *et seq.*) of A. P. Rayford, a son of H. M. Rayford, to the effect that his father shipped all the turpentine and rosin which he manufactured or otherwise obtained during the years 1904 and 1905 to the Union Naval Stores Company.

Rayford further testified that his father did not ship turpentine and rosin to any one else, and that his father sent a memorandum of the turpentine and rosin shipped to the Union Naval Stores Company from time to time, and received account sales from the Union Naval Stores Company for the turpentine and rosin so shipped. (R. 22.)

He further testified (R. 24) that they received monthly statements from the Union Naval Stores Company. These statements contained credits for the spirits of turpentine and rosin which Rayford shipped.

ARGUMENT.

I.

The trial court did not err in refusing to direct a verdict for the defendant.

The contentions to the contrary are made under assignments 17 and 19, and the arguments in support of them occupy pages 35 to 81 of the opposing

brief. The points made are: (1) That there was no proof to support the allegation that any turpentine or rosin was *taken from* the lands described; (2) that there was a failure to identify the lands described as the source of the crude turpentine or "gum"; (3) that, waiving this, there was uncertainty as to the amount of gum and the amounts and values of turpentine and rosin derived from those lands; (4) that the commingling of the crude and manufactured products with like products derived from other lands passed the title of the former to the trespasser Rayford and precluded recovery from the company; (5) that the mortgage given by Rayford to the company precluded recovery against the latter; and (6) that the boxing of the trees and taking of the gum were lawful. These points are given substantially in the sequence adopted by opposing counsel. We will consider them in a somewhat different order.

1. The boxing of trees upon the lands in question was a trespass.

The right of a homestead entryman in respect of the timber on the land entered was carefully considered and defined in principle by the court in *Shiver v. United States*, 159 U. S. 491. That case is a clear authority for the proposition (which, indeed, must be self-evident) that the entryman's peculiar right in the land, and in the trees as part of it, derives exclusively from the homestead law.

Concisely stated, in the words of the opinion (p. 497), it is "the right to treat the land as his own, so far, and *so far only*, as is *necessary* to carry out the purposes of the act." Those purposes are to induce settlement and *bona fide* residence and cultivation for the period of five years. To comply with them it is necessary that the entryman should be permitted to "build himself a house, outbuildings, and fences, and to clear the land for cultivation." But, since "the land entered continues to be the property of the United States for five years following the entry, and until a patent is issued," and since the intention of the law is "to preserve the right of the actual¹ settler, but not *to open the door to manifest abuses* of such right,"

It is equally clear that he is bound to act in good faith to the Government, and that he has no right to pervert the law to dishonest purposes, or to make use of the land for profit or speculation. The law contemplates the possibility of his abandoning it, but he may not in the meantime ruin its value to others, who may wish to purchase or enter it (p. 497).

After quoting the following from Washburn on Real Property—

In the United States, whether cutting of any kind of trees in any particular case is waste, seems to depend upon the question whether the act is such as a prudent farmer would do with his own land, having regard

to the land as an inheritance, and whether doing it would diminish the value of the land as an estate.

the opinion in the *Shiver* case proceeds as follows:

By analogy we think the settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuildings, and fences, and, perhaps, as indicated in the charge of the court below, to exchange such timber for lumber to be devoted to the same purposes; but not to sell the same for money, except so far as the timber may have been cut for the purpose of cultivation. While, as was claimed in this case, such money might be used to build, enlarge, or finish a house, the toleration of such practice would open the door to manifest abuses, and be made an excuse for stripping the land of all its valuable timber. One man might be content with a house worth \$100, while another might, under the guise of using the proceeds of the timber for improvements, erect a house worth several thousands. A reasonable construction of the statute—a construction consonant both with the protection of the property of the Government in the land and of the rights of the settler—we think restricts him to the use of the timber actually cut, or to the lumber exchanged for such timber and used for his improvements, and to such as is necessarily cut in clearing the land for cultivation (p. 498).

It will be observed that the right to cut down trees exists when, for the purposes of residence and

cultivation, it is reasonably necessary that they be used or got rid of; and that in the absence of such a necessity it has no existence. It exists in the one case because the homestead law by necessary implication grants it; it does not exist in the other, simply because the homestead law does not grant it. The decision that Shiver had trespassed was not based upon the penal law against cutting timber on the public lands (R. S. 2461), but purely upon the construction of the homestead law; having exceeded his license under the latter he became an offender under the former.

Three other features deserve emphasis here: First, that to cut timber merely for the sake of profit or speculation is wholly beyond the homesteader's license; second, that the question whether the value of the land is injured or improved by the cutting is not the test; and third, that in measuring the extent of the license careful regard must be paid to the possibility of damaging abuse.

Applying the doctrine of the *Shiver* case to the case before us we would point out, first, that the right to extract turpentine from trees in order that it may be sold for profit is not granted by the homestead law either expressly or by implication. That law seeks only to promote the making of homes through the cultivation of the land. Possibly a homesteader might be able to make some slight use of turpentine in his domestic or farming operations; but always it must be true that the only serious incentive to tap trees and extract the resin

would be to sell it for profit as was done in this case. To cut and dispose of the trees themselves for mere profit is forbidden because, as we have seen, being not necessary or germane to the objects of the homestead law, it lies beyond the license which that law implies. The trees are a part of the realty, and therefore to cut them, when not permitted by the owner, is an injury to the inheritance whether in the particular case it reduces the value of the land or not, and even if it improves it. The owner has a right to insist that the land remain as it is—the trees untouched—except in so far as his license or demise authorizes changes.

Taylor, Landl. & Ten. (5th ed.), secs. 345, 348, 350, 351;

Underhill, Landl. & Ten. (1909), pp. 707, 714 *et seq.*;

McAdam, Landl. & Ten. (4th ed.), pp. 1286, 1291;

Livingston v. Reynolds, 26 Wend. 115.

McGregor v. Brown, 10 N. Y. 114.

Boxing and chipping trees for turpentine is decidedly not cultivation in the sense of the homestead act (*John T. Wooten*, 5 L. D. 389; *Robert L. McKenzie*, 36 L. D. 302; *United States v. Waters-Pierce Oil Co.*, 196 Fed. 767, 769), or in any sense whatever. Cultivation renders the soil more fruitful. Turpentineing, aside from its fatal results upon the trees themselves, which we will notice presently, involves a permanent depletion of their

natural store of sap and resin. In its effect upon the resources of the land the operation is analogous to mining.

It is plain that the process can not be justified as within the implied privileges of a homesteader, since its practice is neither necessary to enable him to fulfil the conditions of residence and cultivation, nor does it have the slightest tendency to promote the objects of that law. If justifiable at all, it must be upon the hypothesis that, like the consumption of natural grasses, or the gathering of wild berries or nuts, it is so clearly innocuous that no injury or temptation to commit injury can be involved. Upon this hypothesis the license would not owe its existence to the homestead law, but to its usefulness and innocence, and if a homesteader has it in respect of the lands entered, no reason is perceived why, like the license to graze animals (*Buford v. Houtz*, 133 U. S. 320), it might not be extended to the public in general in respect of the vacant public domain.

This hypothesis of innocence, however, seems quite too absurd for serious consideration. It is true that the learned Court of Appeals for the Eighth Circuit in *United States v. Waters-Pierce Oil Co.*, 196 Fed. 768, has declared that, in the absence of specific proof, it does not "judicially know that when it [the practice here in question] is carefully and conservatively conducted the continued life and vigor of the trees are impaired or the value of the

land lessened"; but, in that very case the opinion recognizes, without proof, the great dangers and temptations of the practice and the likelihood of damaging abuse. Assuming, without conceding, that the fact that the harm of the boxing process is inevitable may not be judicially noticed, the fact that the process is harmful when not "carefully and conservatively conducted" must be judicially noticed, and this brings the practice at once within the condemnation of the *Shiver* case. Everyone knows that conditions may exist which call for the removal of trees as a measure for the protection and improvement of the forest. If the Government could be assured that this would be done only in proper cases and always "carefully and conservatively" it might well permit the homestead claimants, and even the public generally, to remove its superfluous timber trees and sell them for profit. But in the *Shiver* case, this court recognized that it would be going beyond safe limits even to permit a *bona fide* claimant to resort to the timber to raise money to build his home on the land.

We submit that the *Waters-Pierce* decision is clearly wrong:

First, in allowing, under any circumstances or conditions, the privilege of boxing trees and extracting and vending their resin for profit. Such a privilege is not necessitated by the homestead law nor in any way conducive to its objects; it would "open the door to manifest abuses" (*Shiver* case), and its existence "could not be sustained

without encouraging depredations upon the public lands under guise of establishing settlements upon them in accordance with the liberal policy of the Government." *Stone v. United States*, 167 U. S. 178, 194.

Second, in holding that, the license being assumed to exist, the burden of proving an abuse of it must rest upon the Government. The burden would lie the other way. The license would be "narrow and exceptional" and the licensee should be prepared in every instance to justify his use of it. *Northern Pacific R. R. Co. v. Lewis*, 162 U. S. 366; *United States v. Denver & Rio Grande*, 191 U. S. 84, 90; *Ghost v. United States*, 168 Fed. 841, 848.

Third, in the refusal of judicial notice. The business of extracting and manufacturing turpentine and resin has been for many years one of the great industries of the South, involving enormous areas of pine land in many States. Most of the world's supply of "naval stores" has been derived from it and their export value each year is represented by many millions of dollars. Courts, exercising jurisdiction where this industry is conducted, must know, without proof, of its existence and importance, and something surely of the processes which it employs. The process of boxing and chipping, crude and wasteful as it is, has been in vogue without improvement or modification from the earliest years until quite recently. Cups and gutters have now been substituted to some extent in an effort to retard the inevitable conse-

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quence of destruction to the trees. The manner of a "box," and the "boxing," "chipping," "dipping" process as a whole is as easy to comprehend as the manner of digging potatoes or cutting down a tree. Anyone who has not had occasion to learn of it may do so by five minutes conversation with another who has, or by turning the pages of a book.

The process has been described and its injuries pointed out in published decisions of the Land Department, beginning many years ago. *P. G. Cromartie*, 1 L. D. 607; *Acting Secretary's letter* of July 1, 1885, 4 L. D. 1; *John T. Wooten*, 5 L. D. 389; *Robert L. McKenzie*, 36 L. D. 302. The evils of it, as commonly and notoriously practiced, became so serious that Congress, in the year following the trespass involved in this case, felt constrained to make the boxing and chipping of trees on lands of the United States, including those embraced in unperfected homesteads, or other entries or filings, a criminal offense, punishable by fine and imprisonment. Act of June 4, 1906 (34 Stat. 208; Penal Code, 51). There is a considerable literature on the subject, including a number of Government publications in which the process is described and illustrated by photographs. These will be cited and quoted in an appendix hereto (*q. v.*). They also deal with the history and scope of the industry.

The process absolutely requires that the outer and inner bark and sapwood shall be scored into and gouged off ("chipped") repeatedly during the

growing season, in order to excite a copious and continuous flow of resin; that a deep cavity or "box" shall be hewn into the trunk near its base, sufficient in form and size to retain all or most of the resin which can issue from the wounds above during the intervals between the dippings or collections; and that, in fashioning the box, the trunk be notched and faced downward from the beginning of the chipping, to provide a guide for the flowing resin. The disastrous results of the operation are clearly, and we have no doubt, conservatively, set forth in the documents quoted in the appendix. The commercial value of the tree as a source of turpentine is exhausted in a very few years. Its value as timber, though not greatly reduced to begin with, will rapidly deteriorate. The deep wounds afford ingress to fungi whose mycelium penetrates the heart of the wood and works its ruin. Insects prey upon the weakened trees. The highly inflammable "gum" covering the cut and scarified trunks and the ground at their feet invites consuming fires. The boxes so weaken the trees that high winds readily lay them low. (In this case, a storm blew down all the timber on the homestead. R. 18. One witness said: "I could tell where the line was on the west side from the stake because the timber south of the Freeland homestead had not been boxed on section 32, and that timber was not blown down and there was a line. I could see the line right through" R. 43.)

If all of these results may not be known to courts without proof, some of them must be. Courts must know that trees which have been worked by boxing, however carefully, are less safe and less valuable than they were before. Even if it meant no more, the operation unavoidably leaves the trunks cut and disfigured; weakened to some extent, at least, and exposed to the influences of decay. These are injuries to the inheritance which if done by a tenant without authority would constitute waste, and which certainly exceed the license of the homestead claimant.

Furthermore, in this case there is sufficient *prima facie* evidence of injury. The ruthless manner in which the trees were cut and chipped, again and again, and despoiled of their life-blood without respite, and the character of the company's contract which evidently was intended to compel the trespasser to wring from the trees their greatest possible production, are sufficient evidence, if evidence were necessary or material, that injury must have been done and that avoidance of injury was never within the contemplation of the parties to the operation.

In *Parish v. United States*, 184 Fed. 590, and *McKenzie v. United States*, *id.*, 988, both decided by the learned court below, and in *United States v. Taylor*, 35 Fed. 484, decided by Judge Toulmin, it was squarely held that an entryman had no right to box trees for turpentine. Opposing counsel say

(brief, 80) that the *Parish* case was one of admitted liability and that the controversy concerned the measure of damages only; but this is contradicted by the record and briefs in that case. All four of these decisions, as well as the decisions above cited from the Land Department, were extant when the decision in the *Waters-Pierce* case was rendered. Apparently they were overlooked by the court in that case, otherwise, presumably, its decision would have been different, and it would not have said: "There is no course of reported judicial decisions indicating a settled policy of objection on the part of the Government."

In *Bryant v. United States*, 105 Fed. 941, 944, relied on by the defense, the only question presented was whether boxing and chipping were equivalent to a cutting of timber within the intent of R. S. 2461, the last clause of which defines as a crime the cutting or removal of trees or other timber from lands of the United States "with intent to export, dispose of, use, or employ the same in any manner whatsoever other than for the use of the Navy of the United States." This provision says nothing of injury or destruction, and was held to include only the severing of trees, or their removal after severance, with the intent specified. The remarks concerning common knowledge of the practice and methods of turpentineing were *obiter*. The court said that if Congress had

intended to protect the public lands "from the ravages of that business" when the penal provision was made, in 1831, it would have used more appropriate words. It was dealing only with that provision, and the question whether the practice was violative of the property rights of the Government or permissible to a homesteader was neither presented nor discussed.

2. *The record amply justifies the finding that the trespass was wilful.*

(a) The trespass being proven, wilfulness is presumed. (b) The burden of proving the trespass innocent was on the defendant. (c) The evidence introduced proves wilfulness, not innocence.

(a) There is a legal presumption that one who takes or converts to his own use the property of another intends so to do, and a jury may lawfully infer from such taking and conversion and the wrongdoer's reckless disregard of the owner's right and title that he had knowledge of that right and title, and intended to appropriate the property to his own use in the absence of persuasive evidence of his innocence and good faith.

United States v. Ute Coal & Coke Co., 158 Fed. 20, 23.

Liberty Bell M. Co. v. Smuggler Union Co., 203 Fed. 795, 802; certiorari refused by this court, 231 U. S. 747.

Central C. & C. Co. v. Penny, 173 Fed. 340, 344.

(b) The burden of proof (in the correct sense) rests upon the defendant to establish innocence by a preponderance of evidence. The plaintiff's property can not be divested by a trespass; therefore he may retake it in specie, or at his election sue for its value. The law, however, recognizes the equity of the innocent trespasser to have allowed him the value he has added to the thing wrongfully taken. This is a partial affirmative defense and must be proven by a preponderance of evidence.

This proposition and the reasons for it are admirably discussed by Judge Lowell in *Trustees of Dartmouth College v. International Paper Co.*, 132 Fed. 92.

See, also, 1 Corpus Juris, 388;

Beechwood Ice Co. v. American Ice Co.,
176 Fed. 435.

United States v. Ute Coal & Coke Co.,
supra, p. 23;

Liberty Bell M. Co. v. Smuggler Union Co., *supra*.

The brief of plaintiff in error at divers places refers to the verdict in this case as a "punishment," and the higher measures of damages generally as "punitive." We hardly need point out the fallacy of this idea. In the absence of proof that the trespass was innocent, plaintiff is entitled to retake his property whether improved or not, or in this form of action, to recover its value at the time of conversion; for the taking and alteration do not "divest

the title nor the right of possession. The recovery of any sum whatever is based upon that proposition."

Woodenware Co. v. United States, 106 U. S. 432, 435;

Pine River Logging Co. v. United States, 186 U. S. 279, 293;

Northern Pacific R. Co. v. Lewis, 162 U. S. 366, 374;

St. Louis Stave Co. v. United States, 177 Fed. 178, 181.

That the damages are merely compensatory is clearly shown in *Trustees of Dartmouth College v. Paper Co.*, *supra*, p. 96.

(c) The evidence shows affirmatively that Rayford's trespass was wilful, or, what amounts to the same thing, reckless (*Liberty Bell Co. v. Smuggler Co.*, *supra*).

He was warned by the homesteader, who feared to include the homestead in the transaction (R. 17), but he paid no attention to the warning, beyond observing: "There is no law against turpentineing a piece of homestead land as long as you are on it" (*ib.*). He was even warned by the words, at least, of his own contracts with the company (R. 27, 35). He went ahead recklessly and wantonly. There is nothing whatever to suggest an honest belief in his right. The suggestion that he relied on the *dicta* in the Bryant case (opposing brief, 67) is purely fictitious. Besides, as we have already shown, there was nothing in that case to excuse a civil trespass.

3. *The requests for peremptory instructions are not sustainable on the ground of variance.*

(a) One claim of the plaintiff in error is that the allegation that all of the turpentine and resin were "taken from " the homestead was not sustained, since it is conceded that only the crude resin or gum was so taken. This is a play upon words. The action being an ambulatory one for the conversion of the manufactured products, it was not necessary to allege the place of conversion. Nor was it necessary to aver the source of plaintiff's title to the goods converted. (38 Cyc. 2069; *Melrose Mfg. Co. v. Kennedy*, 59 Fla. 312.) The complaint meant to identify the goods (for the benefit of the defendant) by specifying that they were "taken from," *i. e.*, obtained or derived from, the Freeland homestead. If the expression here used was not the most accurate that could have been employed, there is nothing to indicate that the defendant was in any way misled by it.

The trial proceeded throughout upon the theory that the conversion charged was a conversion occurring after the crude resin had been taken from the land by the trespasser, and after the refined products had been by him manufactured and shipped to the defendant at Mobile. If the defendant had desired to base an objection on the fanciful construction of the pleading now urged, it should have objected to the evidence on that ground. This was not done; nor was any such objection pre-

sented in the form of a notice to strike out evidence or for an instruction to the jury. If the point had been made in either of those ways opportunity would have been afforded to make a verbal amendment to overcome it. It would be intolerable to recognize such an objection as lurking in a general request to have the jury instructed that "they ought to find a verdict for the defendant" (R. 76) or "ought not to find a verdict for the plaintiff." (R. 75.)

(b) Plaintiff in error also urges (brief, 36) that there was a failure to identify the homestead land from which the crude resin came with the land described in the complaint. As to which we say:

First, the objection goes only to a part of the description; the accuracy of the remainder is not disputed. There was ample evidence that part of the resin came from the land which was described with technical accuracy. The objection, therefore, even if sound, could not be considered in a request for a directed verdict. It should have been presented by objections to evidence or by a special request that the jury confine their consideration to the products derived from the lands which were correctly described in the complaint. The defect of pleading, if it was one, was easily amendable.

Secondly, the description of the land was not of the gist of the action, and the defendant not having seen fit to make a special and timely objection based on the alleged defect has no just cause to complain of it. The defendant was in no wise

misled; the record will show clearly that the lands which were the theater of the trespass and from which the resin was taken were all lands of the United States subject to the unperfected homestead entry mentioned in the complaint.

Thirdly, the description used was sufficiently accurate.

The complaint described the land as "the southeast quarter of southeast quarter, the south half of fraction B, section 29, the southwest quarter of southwest quarter of section 28, and the northwest quarter of northwest quarter of section 33, township 5 south of range 4 west, in the county of Mobile, State of Alabama, which land was then and there known as the Louis I. Freeland homestead" (R. 1). The application was amended by the department by substituting "S. $\frac{1}{2}$ of lot No. 3" and "S. $\frac{1}{2}$ of lot No. 4," for the descriptions in section 29 (R. 5, 7, 14). That this was a substitution of designations and not of lands clearly appears. The surveyor, Buck, (R. 41) shows that in surveying part of the Freeland homestead, after he had run the south line of the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 28 (about the description of which there is no dispute), he "continued west on the south line of fractional section 29 and still on the south side of Freeland to his southwest corner, being the intersection of the fractional section (viz, 29) in Alabama, and the fractional section in Mississippi—the intersection of the Mississippi line."

Hoisington says (R. 44) that he followed the section line bounding section 33 on the north, and stopped "on what we call the south half of fraction B of 29. * * * I walked across the northwest quarter of northwest of 33 so I could see over the southwest of the southwest of 28, and did the same thing on the southeast of the southeast of 29 and the south half of B" (*ib.*). He "went within that fraction B to the State line" (R. 43), starting from the southeast corner of the southwest quarter of section 28 and running "the section line between 28 and 33 westward."

Holder (R. 52) surveyed the Freeland homestead, including "the south half of the south half [of the south half] of fraction B, section 29—that is, a portion of south half of south half of 29 lying between west boundary of 28 and the Alabama and Mississippi boundary." Upon examination of the official field notes, he stated (R. 53):

Lots 3 and 4 are the same as the south half of fraction B. That is, it is the south half of the south half of that portion of fraction of 29 lying between the east boundary of 29 and the Alabama and Mississippi lines. The two descriptions are of identically the same land.

The plat incorporated in the field notes (R. 56) shows sections 33, 28, and fractional 29, the south half of which last is divided into "lots 3 and 4." The register's letter of February 14, 1905 (R. 7), speaks of this entry (before the amendment of the papers) as one for the "SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and S. $\frac{1}{2}$

of lot 3 of section 29," etc., and of there "appearing to have been an error as to *designation* as fraction B."

From all this it appears quite plainly enough that fraction B was a designation locally accepted, though inaccurate, of part of section 29, abutting on the west line thereof, and that the land applied for originally, by use of that designation, was the same as that described by the amendment. Possibly all uncertainty on the subject would have been removed by the pages of the tract book which were put in evidence (R. 60) but are not included in the record. As the bill of exceptions does not contain, and is not certified to contain, all the evidence, the defendant is in no position to urge that the evidence was indefinite.

Again, the complaint, as we have seen, describes the land as land "then and there known as the Louis (Lewis) I. Freeland homestead." Freeland testified (R. 15) that this was the only homestead entry he ever made; that he showed the boundaries to Rayford and cautioned him against boxing on the homestead, but that Rayford went ahead notwithstanding, and worked it for turpentine (R. 17, 52).

The witness Britton testified that the land known as the Freeland homestead was worked for turpentine in 1905 and 1906, and that he was present when Buck and Hoisington made their survey of it after the storm (R. 18, 19).

A. P. Rayford testified that his father, Henry, operated and obtained turpentine from the Lewis Freeland homestead in 1904 and 1905. Throughout his testimony the land is referred to as the Freeland homestead (R. 19). Hoisington, as we have seen, testified that he ran the lines of the Freeland homestead and speaks of it as containing Fraction B (R. 43 and 44). Freeland, when recalled, testified that the Richard Hubbard boxes covered all of the Freeland homestead except 40 acres, and extended over 40 acres not belonging to it (R. 51). It appears abundantly from the record and is without contradiction that the elder Rayford obtained the resin from the land known as the Freeland homestead, and that the estimates are based upon the boxes found on that homestead. The question whether the alternative description given in the complaint was in part meaningless becomes therefore wholly immaterial.

Fourthly, the question of the identity of "Fraction B" was a question of fact for the jury and is settled by the verdict.

4. *There is no such vagueness or uncertainty in the evidence concerning the amount and value of the goods converted as would warrant an attack upon the verdict.*

Much of our learned opponent's argument in this connection has to do directly or indirectly with the size of the verdict. We should be glad to meet him on that ground if anything could be gained by so

doing; for the verdict, large as it appears to him, is less than half of the amount sued for. But, obviously the amount of the verdict is not a proper subject for examination on a writ of error. The defendant, if it felt aggrieved thereby, should have made a motion for a new trial.

The only question here is whether there was evidence sufficient to warrant any verdict at all. Two courts and a jury having found that there was, it now devolves upon the plaintiff in error to point out clearly wherein they were all in error.

The learned counsel's brief, however, shows upon its face that the uncertainties of which he complains were uncertainties inherent in the nature of the case, and the solution of which fell to the peculiar province of the jury.

We will content ourselves with indicating the more important features of the evidence, without stopping to reconcile or discuss uncertainties of mere detail.

The Freeland homestead, concerning the status and identity of which there is no doubt, contained 185.34 acres (R. 12). It was operated for turpentine for three seasons—1904, 1905, and 1906. The operation of 1906 is not here involved. That was conducted by one Pringle (R. 47), who bought out his predecessor, the trespasser, Henry Rayford, in the late fall of 1905 (R. 25), and began working the trees in the following spring (R. 47). A storm blew down the trees in September, 1906 (R. 17, 18). Henry Rayford's operations on this land were con-

ducted through the seasons of 1904 and 1905 (R. 19). His contract with the defendant company, which included part of the homestead (R. 33), was dated December 21, 1903 (R. 25, 38), and obligated him to cut boxes in virgin timber that same winter (R. 25). There is evidence that he did some *boxing* on the homestead that year (R. 15), but there is none that any part of the homestead had been otherwise operated that year or any year previous. On the contrary, the evidence is quite persuasive that no "gum" was taken from it until the season of 1904. Owen, who worked for Pringle in 1906, says that the boxes were then in their third year (R. 47, 48), which is corroborated by the testimony of Hoisington (R. 42) regarding the streaks, and by the testimony of Freeland (R. 15) regarding his leasing arrangement with Rayford.

The chipping was done for Rayford by Richard Hubbard (R. 16). He "started to chipping the homestead" (R. 51). His boxes, according to Freeland, covered all of it but 40 acres, and only 40 acres more (R. 51, 52). These boxes were well known to some of the witnesses who didn't know the homestead lines. They averaged 50 per acre (R. 46). Hoisington, who examined the homestead itself after survey, shows that 175 acres of it were boxed, the boxes averaging 50 per acre and about $1\frac{1}{2}$ to the tree (R. 42). The boxes were medium size and very well cut (R. 47). The normal production of the boxes in crude gum was

shown by the testimony of Rayford's son (R. 19 *et seq.*), who had much to do with his father's business, and by the testimony of Owen (R. 46 *et seq.*) and Hoisington (R. 42). From all this it was possible for the jury to estimate quite accurately the amount which Rayford senior must have obtained from the homestead during 1904 and the amount during 1905. There can be no doubt, after reading the testimony of the younger Rayford, supplemented by that of Freeland and the cutthroat contract with the defendant company, that all of this gum went from the homestead to the Rayford still and was there converted into spirits of turpentine and rosin.

The witness Rayford testified that all of their business was with the company. They shipped all of the spirits and rosin manufactured to that concern at Mobile with memoranda inclosing bills of lading and received back monthly statements (R. 22), which were lost (R. 24). The company admitted (R. 39, 40) that during 1904 and 1905 it received from Rayford, under the contract, specified quantities of manufactured turpentine and rosin largely in excess of the amounts mentioned in the complaint. Definite testimony was given by Rayford and Owen of the amounts of turpentine and rosin ordinarily derived from given quantities of the gum, so that it was a mere matter of arithmetic for the jury to ascertain the amounts of each derived from the gum taken by Rayford from the

homestead. There were various grades of rosin, but only one of turpentine. The values of each were fluctuating but the highest and lowest for turpentine and for each grade of rosin during each of the two years were agreed in the record (R. 40).

From the foregoing it will be seen that to have directed a verdict for the defendant upon the ground that the evidence (which stood wholly uncontradicted) was insufficient to sustain a verdict for the plaintiff, would have been a gross error.

The evidence went in practically without objection, and no error is here assigned touching the introduction of any part of it. It was all that the Government could possibly produce in the circumstances and, as was said in the case of *Sauntry v. United States*, 117 Fed., 132, quoting Lord Mansfield:

All evidence is to be weighed according to the proof which it was in the power of one side to have introduced, and in the power of the other side to have contradicted.

In the *Sauntry* case the suit was for the value of timber which had been cut, and the appeal was based on an assignment of error regarding the judge's charge in reference to the quantity that had been taken from the land. The charge of the lower court in that case is set out in the reported case in 117 Federal and discusses the value of such estimates.

In a recent case, to wit, the case of *United States v. Union Naval Stores Company*, which was tried in

the District Court of the United States for the Southern District of West Virginia, Judge Keller, in his oral charge to the jury, used the following language:

The burden is upon the plaintiff to prove to your satisfaction by a preponderance of the evidence the amount and value of the product obtained from Government lands as charged in the several counts in the declaration and converted to the use of the defendants. However, in making this effort at proof, I have allowed the Government to produce such evidence as was possible under the circumstances. You will recall that this product while in the crude state was intermingled by those who distilled it with other similar crude gum obtained from lands not claimed or owned by the United States. Owing to this fact, it became physically impossible to prove just how much turpentine and resin, and what actual quantity or quality thereof, was actually produced from the trees on the land, and, indeed, for the same reason, was impossible to prove just how much crude gum was obtained from the trees on this land, but in this state of affairs evidence was offered by the Government to show that persons familiar with the business could estimate, with reasonable certainty, what the yield would be from a given number of boxes, as they are called, of crude gum from lands of the character of those in this suit. This production, it was testified, varied according to the age of the boxes, it

being shown that the virgin year, or first year, boxes made more product and old boxes the least product. It also developed that there was a difference in the quality of resin produced from crude gum, depending partly on the age of the boxes from which it was obtained and upon other circumstances, chief among which was the care and skill of the distiller, and the qualifications of the various distillers that handled the products of turpentine and resin produced on these lands, were referred to in the testimony of certain witnesses. The result of all the testimony was that, given the number and age of the boxes and the general character of the lands and timber, it was possible to estimate with reasonable certainty the amount and quality of turpentine and resin which would normally be realized from such boxes, the factors which would interfere with such estimates being weather, fire, storms, and carelessness or irregularities in the working operation. * * * Acting upon such theory, in the absence of any proper method of obtaining the actual production from the lands, I have admitted evidence of the estimates, and from these it is your province to gather, if you can, such information that will enable you to say that *at least so much* turpentine and resin was produced and that it was worth *at least so much* money.

You will recall that these estimates by persons familiar with the business varied in some particulars, but my recollection is that they were in general very harmonious, and,

with the caution to accept the lowest when in doubt, I am satisfied to have you act upon such evidence in the absence of any better evidence on this phase of the case.

There was evidence to the effect that the Union Naval Stores Company got every pound of turpentine and rosin which Rayford manufactured during the two years in question, and if the estimates reasonably satisfied the jury as to the amount of crude gum taken from the lands described in the complaint, and the amount of turpentine and rosin manufactured therefrom, it necessarily would reasonably satisfy them that the Union Naval Stores Company got such an amount of turpentine and rosin, because the uncontradicted evidence was that they got it all.

The court charged the jury particularly that before they could return a verdict they must be reasonably satisfied that a definite amount of turpentine and rosin obtained from the lands described in the complaint was converted by the defendant. In this connection we call this court's attention to the second, third, and fourth charges, which appear in the record on page 69, two of which are:

The court charges the jury that in order for the plaintiff to recover in this case the evidence should reasonably satisfy the jury that the defendant converted property of the United States and that some *definite amount* was so converted and that said property so converted had a *definite value*.

And if the evidence reasonably satisfied the jury that the defendant did convert property of the United States, but leaves the minds of the jury in such an unsatisfied state concerning the amount thereof so that the jury can not conscientiously say upon their oaths under the evidence that the verdict should be for any specific amount, they ought not to find a verdict for the plaintiff for more than 1 cent.

The court charges the jury that in order to render a verdict for the plaintiff for more than nominal damages for the conversion of spirits of turpentine and resin the evidence should reasonably satisfy the jury that the defendant converted a *definite amount* of spirits of turpentine and rosin and that same was manufactured from crude gum taken from the lands of the United States, described in the complaint, and that said rosin and turpentine had a *definite value* at the time and place of conversion, which said definite quantity and definite value must be shown by the evidence, or some part of the evidence, to the reasonable satisfaction of the jury.

5. *Leaving the mortgage aside, it is plain that the Government's right to recovery was not affected by the mixtures and alterations wrought by the guilty trespasser.*

Rayford, by a wilful trespass, took crude resin from trees growing on lands of the Government, and (presumably) mingled it with crude resin which

he had rightfully acquired from similar trees in the vicinity. Nothing can be plainer than that when this was done the right to the possession of the entire mixture was in the Government, and the whole title also, if division was not clearly possible without loss to the Government. "Confusion of Goods," 6 A. & E. Enc., p. 594, *et seq.*

In *The "Idaho,"* 93 U. S. 575, 585, it was said:

It is admitted the general rule that governs cases of intermixture of property has many exceptions. It applies in no case where the goods intermingled remain capable of identification, nor where they are of the same quality or value; as where guineas are mingled, or grain of the same quality. Nor does the rule apply where the intermixture is accidental, or even intentional, if it be not wrongful. But all the authorities agree that if a man wilfully and wrongfully mixes his own goods with those of another owner, so as to render them undistinguishable, he will not be entitled to his proportion, or any part, of the property. Certainly not, unless the goods of both owners are of the same quality and value. Such intermixture is a fraud. And so, if the wrongdoer confounds his own goods with goods which he suspects may belong to another, and does this with intent to mislead or deceive that other, and embarrass him in obtaining his right, the effect must be the same. Thus it was ruled in *Ryder v. Hathaway*, 21 Pick. 306. Such is the present case. The confusion of the bales of cotton was not accidental. It was purposely made.

The intermixture was evidently intended to render any identification of particular bales impracticable, and to cover them against the search of a suspected owner. It was, therefore, wrongful. And the bales were not of uniform value. They differed in weight and in grade. But even if they were of the same kind and value, the wronged party would have a right to the possession of the entire aggregate, leaving the wrongdoer to reclaim his own, if he can identify it, or to demand his proportional part. *Stephenson v. Little*, 10 Mich. 447. The libellants have made no attempt to identify any part.

As for the changes in character due to the work of the trespasser, in so far as they increased the confusion, they only served to fasten the Government's possession and title the more securely upon the property as a whole. For whatever difficulties may present themselves in cases of innocent mistake, it is settled by the great weight, if not the perfect concord, of authorities that a wilful trespasser will not be permitted to deprive the owner of goods of his title or right to possession by adding to their value or by altering their condition or kind.

It is a principle recognized by both the civil and the common law, and based upon the ground that a person should not derive an advantage from his own wrong; that a wilful trespasser who knowingly takes the property of another can not by changing its form or increasing its value acquire title thereto by accession. This rule applies with-

out regard to the comparative value of the labor performed or materials added, and without regard to a change of species wrought, provided the original materials can be traced. "Accession," 1 Corpus Juris, 387.

The principle is so well settled that extended citation is unnecessary.

See

Silsbury v. McCoon, 3 N. Y. 379;
Lampton v. Preston, 1 J. J. Marsh. 455;
Curtis v. Groat, 6 Johns. 169;
Eaton v. Langley, 65 Ark. 448;
Tuttle v. White, 46 Mich. 485;
Rockwell v. Sanders, 19 Barb. 473;
Potter v. Mardre, 74 N. C. 36;
Newton v. Porter, 69 N. Y. 137;
Strubbee v. Trustees Cincinnati R. R., 78 Ky. 481.

Attention is invited to the many cases collected in an elaborate note to the case of *Carpenter v. Lingenfelter*, 32 L. R. A. 422.

In *The Distilled Spirits*, 11 Wall. 356, 368, the court said:

It needs no learned examination of the doctrine of confusion or mixture of goods to make it apparent that if certain spirits belonging to the Government by forfeiture are voluntarily mixed with other spirits belonging to the same party and passed through the process of rectification in leaches, he can not thereby deprive the Government of its property; and if the Government only claims its fair proportion of the rectified spirits, he

certainly can not complain of injustice. The only result of applying the doctrine of confusion of goods would be to forfeit the entire mixture.

Silsbury v. McCoon, supra, is perhaps the leading case in this country, and the doctrines of the common and the civil law were there discussed and shown to be identical. Certain corn owned by one Wood had been taken by the plaintiffs without his authority and with knowledge that it belonged to him, and manufactured into 1,200 gallons of whisky. Defendants, judgment creditors of Wood, caused the whisky to be seized on a *fi. fa.* and sold at plaintiff's distillery. Defendants, having become the purchasers at the sale, and having converted the whisky to their own use, the plaintiffs sued them for the value of it. We excerpt the following from the opinion:

It is an elementary principle in the law of all civilized communities that no man can be deprived of his property, except by his own voluntary act, or by operation of law. The thief who steals a chattel, or the trespasser who takes it by force, acquires no title by such wrongful taking. The subsequent possession by the thief or the trespasser is a continuing trespass; and if during its continuance the wrongdoer enhances the value of the chattel by labor and skill bestowed upon it, as by sawing logs into boards, splitting timber into rails, making leather into shoes, or iron into bars, or into a tool, the

manufactured article still belongs to the owner of the original material, and he may retake it or recover its improved value in an action for damages. And if the wrongdoer sell the chattel to an honest purchaser having no notice of the fraud by which it was acquired, the purchaser obtains no title from the trespasser, because the trespasser had none to give. The owner of the original material may still retake it in its improved state, or he may recover its improved value. The right to the improved value in damages is a consequence of the continued ownership. It would be absurd to say that the original owner may retake the thing by an action of replevin in its improved state, and yet that he may not, if put to his action of trespass or trover, recover its improved value in damages. Thus far, it is conceded that the common law agrees with the civil (pp. 381-385).

* * *

The acknowledged principle of the civil law is that a wilful wrongdoer acquires no property in the goods of another, either by the wrongful taking or by any change wrought in them by his labor or skill, however great that change may be. The new product, in its improved state, belongs to the owner of the original materials, provided it be proved to have been made from them; the trespasser loses his labor, and that change which is regarded as a destruction of the goods, or an alteration of their identity in favor of an honest possessor, is not so re-

garded between the original owner and a wilful violator of his right of property (p. 387).

* * * * *

There is no satisfactory reason why the wrongful conversion of the original materials into an article of a different name or a different species should work a transfer of the title from the true owner to the trespasser, provided the real identity of the thing can be traced by evidence. The difficulty of proving the identity is not a good reason. It relates merely to the convenience of the remedy, and not at all to the right. There is no more difficulty or uncertainty in proving that the whisky in question was made of Wood's corn than there would have been in proving that the plaintiff had made a cup of his gold, or a tool of his iron; and yet in those instances, according to the English cases, the proof would have been unobjectionable. In all cases where the new product can not be identified by mere inspection, the original material must be traced by the testimony of witnesses from hand to hand through the process of transformation.

We think, moreover, that the law on this subject has been settled by judicial decisions in this country. In *Betts v. Lee*, 5 John. 349, it was decided that as against a trespasser the original owner of the property may seize it in its new shape, whatever alteration of form it may have undergone, if he can prove the identity of the original materials. That was a case in which the defendant had cut down the plaintiff's trees and made them

into shingles. The property could neither be identified by inspection nor restored to its original form, but the plaintiff recovered the value of the shingles. So in *Curtis v. Groat*, 6 John. 169, a trespasser cut wood on another's land and converted it into charcoal. It was held that the charcoal still belonged to the owner of the wood. Here was a change of the wood into an article of different kind and species. No part of the substance of the wood remained in its original state; its identity could not be ascertained by the senses, nor could it be restored to what it originally was. That case distinctly recognizes the principle that a wilful trespasser can not acquire a title to property merely by changing it from one species to another. And the late Chancellor Kent, in his Commentaries (vol. 2, p. 363), declares that the English law will not allow one man to gain a title to the property of another upon the principle of accession, if he took the other's property wilfully as a trespasser; and that it was settled as early as the time of the yearbooks, that whatever alteration of form any property had undergone the owner might seize it in its new shape, if he could prove the identity of the original materials (pp. 390-392).

The able argument of Mr. Hill, counsel for the defendants, McCoon and Sherman, is printed with the report of the case and discusses the principles of the civil and the common law in a very thorough and interesting way.

Lampton v. Preston, *supra*, decided by the Court of Appeals of Kentucky in 1829, is another of the authorities very frequently cited. One man *innocently* went upon land belonging to another and, from a clay deposit, produced brick, partly unburnt and partly burnt. The court took occasion to review the law of accession and specification at length. Its findings concerning the rights of a wilful trespasser are revealed by the following quotations:

So much of the civil law as applies to this subject was incorporated by Bracton in his treatise on the laws of England and its rules and directions blended with those of the common law. They have been recognized ever since as the doctrines of the common law, and therefore were transplanted in the American jurisprudence, with the stock on which they were engrafted.

By exploring the civil and common law, so far as they bear on this case, some confusion will be found in their rules, as well as in the application of them to particular cases. But there are two comprehensive and fundamental rules pervading all the authorities which have been consulted on the doctrine of accession and of specification, from the first of which it is not known that there are any exceptions, and from the last of which it is believed that there can not be many. These rules are, first, that no trespasser who takes property of another wantonly and without the owner's consent can ever acquire a right to it by any "accession"

or "specification" whatsoever; second, when the property of one comes to the possession of another innocently, he may acquire the right to it if by "accession" or "specification" the species be changed (pp. 458, 459). * * *

As to the first rule (that a wilful trespasser can not acquire a title to property by merely changing its species), it is sustained by authority. See *Dyer*, 127; *Curtis v. Groat*, 6 John. Rep. 169; and the above opinion in *Burris v. Johnson*. But this rule has no application to this case. It is not pretended that Lampton was a wilful trespasser. The decision, therefore, must depend entirely on the application or some modification of the second rule in relation to the consequences of "accession" or "specification" when there has been no intentional invasion of the property of another.

We are inclined to think, from a survey of all the authorities within our reach, that the accession of mere value by the application of labor or skill alone is, generally, not sufficient to transfer the proprietorship to the operator. There must, in general, be the addition of some other material belonging to the possessor or operator, before the product can vest in him. If there be any exception from this rule (and we do not doubt that there may be), it must be in cases in which the accession of value to the raw material is so far beyond the original value as to impress on the reason of mankind the injustice of permitting the *bona fide* producer of that increased value to be deprived of it (p. 461).

The conclusions reached were that title to the *unburnt* brick did not pass to the innocent purchaser, the court saying in that regard:

It seems to have been an established doctrine of the common law, as early as the year books, that no change of *mere form* could divest the right of the owner of the material, as leather made into shoes, cloth into a coat, timber into plank, blocks, or shingles; in all which cases the material is *not altered in its qualities or kind*, and can be easily identified (p. 460)—

but that to the burnt brick he had title both by accession of labor and material and by specification or change of species.

The reports are rich with learned examination into the conditions—the degree or kind of alteration made, or the value added—that should work a change of title to an innocent trespasser. The case of *Wetherbee v. Green*, 22 Mich. 311, in which Judge Cooley delivered his well-known opinion, was of this character. That opinion concedes the general rule above stated, but holds that the title may be changed by a change of value greatly exceeding that of the original articles, *if the trespasser proves* that he acted in good faith. (See p. 321.) Most, if not all, of the other cases relied on in the opposing brief are likewise cases of innocent trespass. We will not take the space to review them. The general rule is too well established.

It is hardly necessary to add that the company, as Rayford's successor by purchase, agency, or otherwise, could acquire no greater right than he had.

“*Accession*,” 1 Corpus Juris, 388;

“*Confusion of Goods*,” 6 A. & E. Enc., 596;

Woodenware Co. v. United States, 106 U. S. 432.

The rule which forbids that the true owner should be deprived of his goods, without his consent, by a trespass, and a subsequent assignment of them to another, is both just to the individual and necessary to society, and is laid down by innumerable authorities without dissent. Its wisdom and necessity are especially evident in cases like this:

To establish any other principle in such a case as this would be very disastrous to the interest of the public in the immense forest lands of the Government. It has long been a matter of complaint that the depredations upon these lands are rapidly destroying the finest forests in the world. Unlike the individual owner, who, by fencing and vigilant attention, can protect his valuable trees, the Government has no adequate defence against this great evil. Its liberality in allowing trees to be cut on its land for mining, agricultural, and other specified uses has been used to screen the lawless depredator who destroys and sells for profit. *Woodenware Co. v. United States*, 106 U. S. 432, 436.

Cases like *United States v. Detroit Timber and Lumber Co.*, 200 U. S. 331 (cited in the opposing brief, pp. 61, 111), and which have to do with *bona fide* purchasers of a legal or equitable title or right, are obviously inapplicable here.

In *United States v. Waters-Pierce Oil Co.*, 196 Fed. 767, the court said (p. 768) :

The sap, when extracted from the trees, became personal property, and if it was extracted by Painter in violation of the act of Congress above quoted he had no right to it and could convey none; and in accordance with long-established and well-settled principles the Government could reclaim the sap or its products, if specifically identified, even in hands of an innocent purchaser, or recover from him the value, if not so identified.

6. *The company's liability to pay the manufactured value was consistent with such rights as it appears to have had by virtue of the mortgage.*

(a) The company was responsible for the confusion on principles of agency.

The mortgage, or deed of trust, is to be read with its companion piece, the contract, supplemented to some extent by the evidence of Rayford's son. From these sources may be deduced the following situation:

The company's business in one aspect was that of a factor. It agreed to receive the turpentine and rosin resulting from the elder Rayford's activities

during the life of the contract, sell them as factor upon certain stated commissions for its services, and account to him for the profits. The peculiar purpose of the mortgage and contract was to enable the company to swell the volume of business proceeding from Rayford, monopolize it, and incidentally gain a collateral profit by compelling him to purchase all his supplies from the company. It was stipulated, therefore, that the company would advance him money for expenses, and that Rayford would deal with no one else. He was to operate upon the trees growing on the lands mentioned in the trust deed, "using the utmost care and diligence to make them produce the largest possible yield of crude turpentine, and to promptly manufacture therefrom turpentine and rosin." (R. 25.) He was to manufacture not only the resin coming from those lands, but also all other resin coming into his possession, except, of course, from public lands. If he failed or refused to manufacture promptly, he was to deliver the crude turpentine to the company, and if he failed to deliver it the company, *by the contract and independently of the mortgage*, was empowered to seize and manufacture it and sell the products, charging the cost against him. (R. 26.) The company was also authorized to seize and sell spirits and rosin, when manufactured by Rayford, if he failed to deliver them immediately after manufacture. (R. 27.) The contract further stipulated that the proceeds of sales might be applied by the company on any debts owing by Ray-

ford to the company, including any indebtedness secured by the mortgage. (R. 28.) The latter instrument, of even date with the contract, purports to convey Rayford's business and the property, accounts, etc., concerned in it, and his interest in certain described lands (including part of those here involved); also all crude and manufactured turpentine to be acquired by Rayford from those lands or any others, or from any other source, during the life of the contract. (R. 34.) The conditions are that Rayford shall pay certain specified notes aggregating the same amount as the amount agreed to be advanced in the contract, and any other debts that may be due the company for moneys advanced and supplies furnished, and that he shall live up *in all other respects* to his obligations under the contract. (R. 36.) The deed authorizes the company to change trustees any time *at its pleasure*. (R. 37.) If Rayford violates any provision of the contract, or attempts without the company's consent to sell or otherwise dispose of property covered by the mortgage, the company may declare all sums secured due and payable, and thereupon either the company or the trustee may foreclose. (R. 35.) The trustee is empowered to take possession of the property at any time before or after default, and use and operate it *for the purpose of carrying out the contract*, etc. (R. 37.)

We have rarely if ever encountered a more complicated arrangement or one in which the legal relations of the parties were better confused. If the

effects are as claimed, it is easy to see that such a device might operate greatly to the prejudice of innocent third parties and furnish a ready escape from the consequences of depredations on the public lands. It does not appear in this case what, if any, moneys had been lent to Rayford before the date of the contract. Possibly the leases, the still, and the other property described in the mortgage as already existing may have been acquired in his name, or put in his name, through the funds of the company. At least it would be quite simple for a concern like the Union Naval Stores Company, desirous of increasing its business and of avoiding liability, to enter into an arrangement like this with a mere agent or tool of its own, give him the appearance of an independent operator, while depriving him of all independence, require him to agree not to operate on public lands, while furnishing him the most powerful incentive to do so, and then escape all responsibility for his depredations while availing itself of all their fruits, upon the theory that he, an independent trespasser, had wrongfully mingled the Government's goods with the " principal goods " of the company.

We have found no precedents but we respectfully submit that (if the effects would be as claimed) such an arrangement as respects third parties must be contrary to the policy of the law, like a mortgage of chattels unaccompanied by delivery. How can the company successfully disclaim all respon-

sibility for the tortious confusion of goods and pose as an outraged owner even more innocent than the Government itself (cf. opposing brief, p. 73), when Rayford was practically the company's slave, entrusted with the possession of the goods and engaged, when the confusion occurred, in the very act of doing with them exactly what the company had bound him to do by this extraordinary contract? While it is true that a mortgagee who, under authority of a recording act, has left the mortgagor in possession, may follow the goods if wrongfully sold and, if confused with other goods of the mortgagor, may seize upon all for the satisfaction of his mortgage, we have yet to find an authority for the proposition that an innocent third party, bearing no relationship whatever to the parties to the mortgage, may be deprived of his goods in this way for the enrichment of the mortgagee. (*Robinson v. Holt*, 39 N. H. 557.) But this was not a case of ordinary mortgage. Security for mere indebtedness was only one feature of the arrangement. The company had another interest in Rayford's activities independent of any advances or indebtedness. This was an interest to compel the prosecution of the business for the company's profit, and Rayford's. There was a relation analogous to a partnership. It was a common venture in which both were contributors and actors, and from which each was to derive his profit, though by different ways—the company's to come from commissions on sales of rosin and turpentine and profits on the things

bought by Rayford, and his to come from the proceeds of the manufactured products. The company had such an interest in the crude turpentine that it could either compel Rayford to manufacture or could, at its pleasure, take charge and manufacture it itself. In handling it Rayford was carrying on the business of the company no less than his own, and the company can not evade responsibility for the tortious misaction by pointing to his promise not to take turpentine from public lands.

Viewing the situation another way: When the crude turpentine derived from private lands was mingled with that belonging to the Government it was either the property of Rayford or the property of the company. If it was the property of the company, the company, on principles of agency, must bear the consequences of Rayford's tort in causing the confusion. At the very least the case would seem to fall within the principle which, as between two innocent parties, places the loss upon him whose act was responsible for the fact. If, on the other hand, Rayford was the owner, the most the company could claim would be a right of lien, and we will now consider it briefly from that standpoint.

(b) Even if the goods were affected by a lien, the conversion would not be excused or the damages diminished.

The attempt to displace the Government's title upon the ground that the company's lien was attached to the "principal goods" is not supported

by the facts. *The resin of the Government was confused with an equal or less quantity of resin of equal quality owned by Rayford.* There is no warrant for the statement many times made in the opposing brief, that the resin owned by the Government was less in quantity than that with which it was mixed, or that its quality was inferior. The record shows a uniform operation, under one management, involving one kind of timber growing in one very limited locality and subject to identical climatic conditions. It indicates also a fixed quantitative relation between a given quantity of the crude resin and the spirits of turpentine and rosin derived therefrom. In quality the turpentine did not vary. The rosin did so vary, according to the quality of crude resin produced by the trees and the care of operation, the best rosin coming from the first year or virgin crops. The record, however, indicates that first year "gum" was distilled by itself, while all other gum was treated together indiscriminately as it came to the still. (R. 24.) From all this it is only reasonable to infer that the Government's crude resin, as a whole, was at least equal in quality and value with the resin with which it was confused. As for the quantities, it appears (R. 24) that the barrels came from the woods in wagons and were unloaded on the still platform. The best grade having been separated from the common, barrels of the one or the other, as the case might be, were taken one after another and emptied into the still until it had received a charge of twelve

barrels. Upon this showing it is not unreasonable to infer that the barrels coming from the homestead were placed together on the platform and followed each other quite closely to the retort.

The Government's share was therefore divisible from that of Rayford, and the lien was confined to his undivided interest.

Cooley on Torts (3rd ed.), p. 69.

It is elementary that where goods of two owners are confused innocently they will hold in common in proportion to their respective shares, or, if one is in some degree responsible, though guilty of no bad faith or wilful wrong, the courts will recognize his equitable right to such an allowance as will consist with the full protection of the other.

See

8 *Cyc.* 574;

6 *Am. & Eng. Enc. L.* 594;

Ryder v. Hathaway, 21 *Pick.* 305;

Hesseltine v. Stockwell, 30 *Me.* 242;

Osborne v. Cargill El. Co., 62 *Minn.* 400.

The company because of its lien could claim no greater rights than those of a cotenant, and having sold and disposed of the entire property was liable in this action for the value of the Government's share.

Cooley on Torts (3rd ed.), 875;

38 *Cyc.* 2028, and cases cited.

Even if the company acted in good faith (which, by the way, it made no effort to prove), its ignor-

ance of the Government's rights would constitute no defense whatever.

38 *Cyc.* 2024, and cases;
Id., 2010.

(c) The existence and amount of lien were not proved.

The evidence fails to show the state of accounts between Rayford and the company. It is true his son testified generally that the business was always in debt and that to gain relief they were obliged to lease more timber. (R. 25.) This, however, is not sufficient proof of indebtedness to the company. The after-acquired clause of the trust deed could not have continued application, to the prejudice of the Government, after the confusion of crude resin occurred. If the company claimed a lien or other special interest, existing at the time of the confusion, it should have introduced satisfactory proof of it.

(d) If there was a lien, its existence was made immaterial by the sale of the goods.

It appears, however, by the evidence that the plaintiffs in error had actually converted the goods by selling them on the day of their purchase; and if they once had a lien, which would have rebutted the presumption of a conversion, from the mere fact of refusing to deliver on demand, when the amount of the lien was not tendered or offered to be paid, a tender after they had put it out of their power to receive the money and deliver

the goods by an actual sale would have been a useless ceremony and was not necessary to enable the owner of the goods to recover in an action of trover. In such a case if there was a valid lien in favor of the defendants before the conversion, they would be entitled to be recouped in the damage to the extent of such lien; but they could not defeat the plaintiff's action altogether.

Saltus v. Everett, 20 Wend. 267, 273;

See *Galvin v. Iron Works*, 81 Mich. 16.

The lien of the mortgage, if it existed at the time of the sale, attached to that portion of the purchase money which represented the goods derived from private land. The rest was money upon which the company had no shadow of claim.

II.

Other assignments of error discussed.

Assignment 18. Opposing brief, page 81. The instruction requested was amply covered by the instructions given (R. 69).

Assignments 12, 21-28. Opposing brief, pages 82-91.

Some of the instructions requested were based on assumptions of fact wholly unjustified by the evidence; others are objectionable as stating abstract propositions merely. There are a number of other and more specific objections to them, but our discussion will be limited to the points raised in the opposing brief. The evidence did not justify instructions on the rights of tenants in common be-

cause it would not have been proper for the jury to infer such a relation between the Government and the company from the facts proven. Even if the relation had existed it could only be material as bearing on the necessity for a demand for the return of the Government's property. But a demand is never required if it would be useless. 38 *Cyc.* 2026, 2032, 2036. And in this instance the record as it stood when the case went to the jury authorized no other conclusion than that a demand on the company would have been entirely superfluous. The company had received the turpentine and rosin some years before, under an agreement to sell. It had rendered accounts of sales for all the turpentine and rosin received from Rayford and wound up its dealings with him. These facts justified the Government in omitting a demand and required the jury to find a conversion. Clearly they placed upon the defendant the duty of explaining what it had done with the goods if, with its exclusive knowledge of the intimacies of its own business, it knew of a possibility of restoring them to their owner.

Assignment 7, opposing brief, page 91, raises questions already considered.

Assignments 3 and 5, opposing brief, page 92. The only new question here raised concerns the correctness of the direction to find the value as of the time of delivery to the defendant. Opposing counsel protest that the value at the time of conversion

should have been indicated. Where a defendant has innocently bought goods from a guilty trespasser, this court has held that the value at the time of purchase measures the liability.

Woodenware Co. v. United States, 106 U. S. 432.

We have already considered at some length, and endeavored to refute, the proposition that, upon the evidence as it stood, the defendant company could rightfully claim the status of a tenant in common. Even if that were indeed its status, it would still have no cause to complain of this instruction. The Government could not prove the exact times when the goods were disposed of, and the company did not see fit to reveal the information. If the court had said time of delivery instead of time of conversion, the result with the jury must have been the same, and this because the refusal of the supposititious co-tenant to render an account of its stewardship had left the matter in the dark. It was a fair assumption, in the absence of any light from the defendant, that the sales occurred during the years when the deliveries occurred. The highest and lowest values for each of these years, and the fact that they fluctuated, were shown. This was the most that the plaintiff could do.

Assignment 10, opposing brief, page 97. The instruction which forms the basis of this assignment is not subject to just criticism. It assumes the guilt of Rayford because that was not open to dispute.

Its purpose was to caution the jury not to throw aside the Government's case merely because circumstances for which it was in no way responsible had rendered it impossible to adduce more specific evidence of the quantity and value of the goods in question. It merely authorized them to make such *reasonable* inferences as might be *drawn from and justified by* the testimony. Other instructions appearing on page 69 of the transcript, to which we have already referred, told the jury explicitly that they must not find a verdict for more than nominal damages unless reasonably satisfied from the evidence that a definite amount of property of a definite value had been converted.

Assignment 11, opposing brief, page 98. The instruction here criticised authorized the jury, if they could not find the various grades of rosin, to take the average grade, if ascertainable from the evidence; otherwise, to base their verdict on the lowest grade. There was specific testimony that the value of the rosin averaged somewhat more than \$4 per barrel (R. 24, top). There was also more general evidence on the subject of the various grades that would normally be produced and the high and low values of each.

The attempt of opposing counsel (brief, p. 99) to distort this instruction into a permission to render a "quotient" verdict calls for no comment.

Assignments 4 and 9, opposing brief, page 104, relate to the time as of which the value should be

ascertained—a matter to which we have already devoted sufficient space.

As for *Assignments 15 and 16*, opposing brief, page 111, we need but repeat that the defendant's good faith was both immaterial and unproven. If the company deemed it a matter of importance it should have introduced evidence on the subject.

The Assignments 14 and 20, opposing brief, page 113, are based on refusals to instruct that if moneys advanced by defendant to Rayford were used by him in distilling and transporting *the Government's resin*, the measure of damages would be its value in the crude form when taken from the trees.

Fisher v. Brown, 70 Fed. 571, is invoked in support of this proposition. That was a case “where an innocent purchaser from the wilful trespasser, in anticipation of an absolute purchase, and on the faith of a good title to the property in his vendor, *advances money to be expended in improving its value*, and to be credited on account of the purchase money, when the property is delivered in its improved condition, and takes from the vendor a transfer of title to the property in its unimproved condition, pending a completion of the contract, to secure advances thus made.” The opinion further says: “In this case, however, the defendants advanced money for the very purpose of giving the property added value, when it was still in the shape of logs, and secured a transfer of title at the time.”

The present case is entirely different. The company advanced money to Rayford for the general

purposes of business—his business or the common business, whichever it may be regarded. It did not undertake to buy the specific resin derived from the homestead before manufacture nor did it advance any money for the specific purpose of manufacturing that resin. In *Fisher v. Brown* the money was specifically advanced for the purpose of improving the very logs in question, and the title was then and there acquired. If the doctrine of *Fisher v. Brown* could be tortured into application to a case like this, the door would be open wide for fraud and depredations upon the public lands.

CONCLUSION.

It is respectfully submitted that the judgment should be affirmed.

ERNEST KNAEBEL,
Assistant Attorney General.

DECEMBER, 1915.

APPENDIX.

Consisting of extracts from public documents dealing with the injurious effect of boxing and chipping trees for turpentine.

From the letter of Commissioner McFarland to P. G. Cromartie, November 25, 1882, 1 L. D. 607:

In reply you are informed that the boxing of trees for turpentine is held by this office to be injurious to the tree, ultimately killing it if continued for a series of years. As the title to the land entered by you remains in the United States until acquired by you by a strict compliance with the law as to tillage, improvement, and residence, any act in the meantime committed, authorized, or permitted by you, or by any other person with your knowledge or consent, that would in any way injure or destroy the timber or trees thereon would constitute a trespass, and render you liable to prosecution and punishment.

From the letter of Acting Secretary Muldrow to Commissioner Sparks, July 1, 1885, 4 L. D. 1:

For years past the department has at intervals been called upon to examine into cases of turpentine trespass presented for its action, and has, as a general rule, recommended suit for the recovery of the value of the material taken. Experience, however, clearly shows that such action has entirely failed to accomplish the suppression of such unlaw-

ful operations. Parties against whom judgments have been obtained have continued to violate the law even upon an enlarged scale, defying the agents of the Government to their faces; and other parties in the immediate vicinity have entered upon the work of destruction, in no way deterred by the punishment previously visited upon their neighbors.

The report of Agent Griffin, full and explicit as it is, simply corroborates the information already received from other sources, that a pine forest, when used as a "turpentine orchard," is doomed to entire destruction. A "box" or gash is cut into the side of the tree, perhaps 10 inches wide and 6 inches deep, and of such a shape as to catch and retain a considerable quantity of the crude turpentine gum. The next year another "box" is cut at another point in the circumference of the tree, and so on. Besides this, the tree is subjected to a "chipping" process, the bark being cut through down into the woody portion, for 12 or 18 inches above the upper edge of the "box," in order to keep a fresh bleeding surface continually exposed. In four or five years the life of the tree is exhausted. Even should the process of "boxing" be discontinued, decay will ensue from the action of the weather and worms upon the portion of the wood already exposed.

There can be no healing process and no future growth to a pine tree once tapped by the turpentine gatherer's ax. Drippings of gum accumulate in the "boxes" and about the root of the dying tree. From the carelessness of some traveler, or from lightning striking some tree in the forest, fires originate and the entire timber is consumed. After its destruction the land will be covered

in a few years with a growth of worthless scrub oaks, rendering it entirely valueless.

In view of these considerations, I concur in your opinion that the measure of damages heretofore estimated in such cases, based upon the value of the material procured, is insufficient to indemnify the Government for the actual loss resulting from the boxing of trees for turpentine; and you are hereby authorized and directed to assess upon depredators of this class, hereafter, a measure of damages which shall include the injury, present and prospective, inflicted upon the trees which have been subjected to the operation.

From the report of the House Committee on Public Lands submitting bill (H. R. No. 3210, 59th Cong., 1st sess.), which became the act of June 4, 1906 (34 Stat. 208), making turpentine a crime:

The destruction of turpentine trees on the public lands does not seem to be adequately covered by the existing criminal statutes.

The following correspondence will explain the necessity of the bill and the reason for its enactment.

The correspondence mentioned consists of letters from Secretary Hitchcock and Commissioner Richards, respectively. In the letter of the Commissioner (transmitted to the committee and concurred in by the Secretary) appear the following statements:

In its efforts to protect the timber on the public lands the office has been seriously handicapped by the lack of legislation of the character proposed. That many thousands of trees on public lands and unperfected entries are box cut every year for the purpose of obtaining turpentine therefrom is

indisputably evidenced by reports received by the office from special agents located in those sections of the country in which the turpentine industry flourishes. Naturally only a certain per cent of the depredations of this character are discovered, knowing which—and that in the event of discovery civil suit, with its many possibilities of failure to maintain on the part of the Government, is the only penalty—the trespassers can well afford to take the chances involved.

Until the question was tested in a higher court than the district courts this Office and the department were of the opinion that criminal action would lie under section 2461, Revised Statutes. In the case of *Andrew J. Bryant et al.*, Florida, this Office recommended both civil and criminal action, pursuant to which proceedings were initiated and resulted in the conviction of Bryant. The case was taken on error to the Circuit Court of Appeals, Fifth Circuit, which on January 8, 1901 (105 Fed. Rep. 941), held as follows * * * (quoting):

Since that decision was rendered the action of this Office on turpentine-trespass cases has been limited to the recommendation that civil suit be brought, which, of course, is utterly inadequate as a deterrent force. Investigation by special agents of this Office of turpentine trespass upon the public timber, and by the Department of Agriculture of the turpentine industry in general, leads to the belief that unless the Government takes some action to curb the unlawful traffic a vast amount of the public timber is certain to be destroyed, and this will continue year by year so long as there is timber left.

The experiments conducted by the Bureau of Forestry, Agricultural Department, prove

that only slight damage [?] is done to the tree where modern and conservative methods are employed, but it is almost needless to state that conservative methods are not employed by trespassers who are not interested in the preservation of the timber, and whose sole idea is to obtain the greatest amount of turpentine in the least time, regardless of what the effect may be. The result of these haphazard methods is clearly shown in Bureau of Forestry Bulletin No. 40, entitled "A New Method of Turpentine Orchardling," to photographic plates Nos. IV and V, of which reference is made.

Very common, and a method which would naturally commend itself to the trespasser, is the process of "back boxing," which consists of the making of exposed or "bleeding" surfaces on two or more sides of the tree, with receiving boxes for each. Trees so cut fall victim to the slightest storm and, strewn throughout the forest, afford fuel to the forest fire. Whether by storm, fire, or the sapping of its vitality, the destruction of the persistently boxed tree is certain and only a matter of a few years.

From a profusely illustrated monograph entitled "A New Method of Turpentine Orchardling," by Dr. Charles H. Herty, expert of the Forest Service, Bulletin No. 40, Bureau of Forestry, 1903 (pp. 9-13):

Formerly an unbroken forest of longleaf pine extended from southern Virginia through the South Atlantic and the Gulf States to eastern Texas. The advance of the naval-stores industry into this region has been due to the depletion of the forest under its attack. More than one-half of the original forest has been exhausted, with no

renewal. Conservative operators now estimate a standing supply of virgin timber sufficient only for 15 years of box cutting.

Until recently the destructive methods in use have been regarded with entire indifference in the regions affected. This has been due to the low valuation of timber throughout the turpentine belt, and to the popular belief that the pine forests of the Southern States were inexhaustible. But it has now become evident that if the naval-stores industry is to be perpetuated some method must be found which will not be prohibitive of later operations in the same field * * *.

Turpentine gathering, as now conducted in the United States, is needlessly destructive of the forests and needlessly wasteful of the product. The method, under the box system now universally employed, is to chop in the base of the tree itself a cuplike cavity, the sole purpose of which is to receive the resin which flows from a scarified face of the trunk above it. The box itself does not add to the flow of turpentine; on the contrary, experiment has proved that it diminishes the flow. It is an unnecessary wound driven into the body of the tree at its most vital spot, both weakening its vigor and lessening its power to support the strain of the wind. At the same time it opens the trunk to disease and provides a storehouse of combustibles against the coming of the forest's great enemy—fire. A forest which has been heavily turpented by this method has before it only decay and death.

To make clear in detail the evils of the box system and the exact modification of the present methods proposed in order to carry into effect the plan advocated in this bulletin, it is necessary to describe in full the process by which turpentine is now gathered.

This is the first step in turpentine operating, and employs the turpentine labor during the winter. The box is a cavity 14 inches wide, 7 inches deep, and $3\frac{1}{2}$ inches from front to back, cut into the base of the tree by means of a long, narrow ax. (Pl. I, fig. 1.) This box has no other function than that of a receptacle for resin. Two, three, and sometimes four boxes are cut in the larger trees. In the small trees the box is necessarily smaller, although larger relatively to the size of the tree.

Box cutting is followed by cornering. This is done with an ordinary ax, a right-handed and a left-handed man working together. A slanting cut is made through the bark and about 1 inch into the sapwood, the cut rising slightly from the top of the back of the box to a point perpendicularly above the corner of the box. By a side blow with the ax the wood is then split out between the cut and the rounding edge of the back of the box. (Pl. I, fig. 2.) The object of cornering is to provide a suitable surface for the subsequent scarification of the tree, and to direct the resin into the box.

In early spring the "chipping," or scarification of the trees, begins. It is continued weekly until November, and serves to open fresh resin ducts. (Pl. II, fig. 1.) The work is done by means of a "hack," a tool consisting of a flat steel blade in the form of the letter U. This blade, sharpened along its under edge, is fastened by means of a shank, at a right angle, into a wooden handle $1\frac{1}{2}$ feet in length, on the end of which, to give greater momentum to the stroke of the "hack," is set an iron weight of from 5 to 7 pounds. The "chipper," standing squarely in front of the box, removes with the "hack" a strip of bark and sapwood three-fourths

of an inch wide just above the exposed surface produced by cornering, the laterally-inclined strokes being made from the right and from the left sides and penetrating the sapwood about 1 inch at the deepest point. The freshly exposed surfaces of sapwood, called the "streak," meet just above the center of the box. The angular point thus formed is known as the "peak." The distance of the "streak" from the box increases with each weekly chipping. When the distance from the box is too great to admit of easy reach with the "hack," another tool, the "puller," is substituted, the result being the same in each case. (Pl. XII, fig. 1.) Thirty-two streaks or chippings constitute a full season's work for the chipper.

Immediately after chipping the fresh resin appears and flows slowly into the box below. The flow is most rapid during the first two days after chipping; it then grows gradually less until, after six or seven days, no further flow takes place on most of the trees. At intervals of three or four weeks the resin in the boxes, called "dip," is transferred to large buckets by means of a flat metal instrument set on a long handle and called a "dipper" or "dip" spoon. (Pl. II, fig. 2.) From the buckets the dip is emptied into barrels placed at suitable intervals. The filled barrels are then hauled to the distillery, or "still."

At the close of the chipping season the resin which has hardened on the exposed "face" of the tree, called "scrape," is removed by a sharpened flat tool and collected in barrels for distillation. This scrape contains approximately one-half as much spirits of turpentine as the dip from the boxes. * * *

The box lessens the power of the tree to produce resin by the injury to its vitality,

and results in an important loss to the operator in the quantity of resin obtained. * * *

(a) In boxing, the smaller trees are often cut at least two-thirds across. Many of these trees are blown down by wind. (Pl. IV.) So also when two boxes are placed in medium sized trees the strip of wood left is often too narrow to support them. Much worse is the case of "back-boxed" timber, or timber which it is sought to work a second time by cutting fresh boxes between the old ones wherever space can be found. The slightest storm is sufficient to level such a tract. (Pl. V, fig. 1.)

(b) But the greatest injury to timber from boxing is indirect, and its effect is felt only after turpentine operating is ended. So long as the turpentine operator has charge of the timber, he protects the trees from fire each winter by raking. When the woods are burned in February a few of the boxes which have been imperfectly raked catch fire; but this is the exception. But when the operator leaves, the timber owner, having no longer a direct revenue from the timber, does not take the precaution of raking the timber each year. Consequently, fire easily catches in the old resin which collects in the boxes. (Pl. V, fig. 2.) To make matters worse, the heat of the burning resin in the box draws out the resin from the old face above, which, catching fire and melting, flows down into the box and increases the fire. Even if the tree is not destroyed, much of the fresh growth of new wood around the box is burned, thus retarding the recovery of the pine.

(c) The constant presence of water in the old box frequently produces rotting at the base of the tree, so that many pieces of timber cut from old boxed trees must be butted at the sawmill.

(d) Dr. A. D. Hopkins, of the Division of Entomology, United States Department of Agriculture, who has charge of the investigations of injurious forest insects, in cooperation with the Bureau of Forestry, informs the writer that, in general, any injury which serves to weaken the vitality of pine trees renders them specially attractive to certain bark and wood boring beetles and grubs, and that the severe injury to the longleaf pine which often results from boxing, together with the subsequent injuries by forest fires, offers most favorable conditions for the work of destructive insects. These not only kill such trees, but breed in them in such numbers that when the broods of adults emerge they attack and kill near-by uninjured trees.

The latest treatment of the subject which has come to our attention is Bulletin No. 229 of the Department of Agriculture, by A. W. Schorger, chemist, and H. S. Betts, engineer, Forest Products Laboratory, July 28, 1915. This, like the bulletin last mentioned, contains numerous photographs, also cuts, illustrating the enormous injuries to the trees inseparable from the process of boxing and chipping. The process is described substantially as in the extracts we have given from the other bulletin. We quote the following:

Since the box is rarely more than 12 inches from the ground it is within easy reach of ground fires. As both box and face are saturated with resin, a fire once started in the box may burn the tree off at the base or render the face and box unfit to produce gum. In cupped timber the cups are moved up at the end of the season and are less exposed to fires.

Another source of fire arises from the resin which impregnates the ground at the base of the tree. Such resin may come from losses in dipping, overflow from boxes on very productive trees, or from leaning trees. This waste resin may defeat the entire purpose of raking. Spilling is less likely to occur with cups than with boxes, since the former can be detached and held directly over the bucket in dipping. By having extra cups for very productive trees the chipper who visits them weekly can quickly change the full cups for empty ones and thus prevent overflow.

The immediate danger of destruction of the timber is not so great while the trees are being turpentineed as when the crop has been abandoned, since during the period of active operation the trash is raked from about the trees. Few tracts of timber escape the annual burning over, and turpentineed trees are often either killed directly or permanently injured. While the damage to abandoned cupped timber is heavy, it is not so serious as in boxed timber, since the cups are removed when the trees are abandoned and the faces are the only source of fire risk.

The box enters the tree so deeply as to injure its vitality and retard the process of growth. Boxes are generally cut in the most prominent root swellings, especially in leaning trees, as when so placed they will more readily catch the gum and are also easier to cut. The box undoubtedly curtails the food supply of the tree to a considerable extent and accounts for the fact that more "boxed" than "cupped" trees die after tapping.

The box weakens the tree so that it is liable to be blown down by the first storm. This is especially true of small timber which may have from one-half to two-thirds of its

diameter severed by the box, and of timber in old orchards that has been "back boxed," i.e., boxes cut between the old ones wherever there is available space. * * *

Since the box fills with water after the trees are abandoned, the surrounding wood is kept moist, increasing the likelihood of attack by fungi and subsequent decay. In some cases the box is filled with earth after abandonment to prevent it from catching fire. While it may serve the latter purpose, the procedure is scarcely to be recommended, since the earth retards evaporation of the water and hastens decay.

Trees that have been "boxed" are sometimes attacked by bark-boring and wood-boring insects, the former killing the trees and the latter seriously damaging the wood.

The wood back of the "faces" in timber that has been turpented for several years is generally impregnated with resin for a depth of from one-half to one and one-half inches. As very resinous material will not make high-grade lumber, the proportion of high-grade material that can be cut from "turpented" timber is somewhat less than in the case of similar "round" timber. However, in many cases the process of squaring up the log by sawing off slabs will remove the resinous parts, and the grade of the boards finally cut will not be affected. Tests have shown that the strength of the wood is not altered by turpenting (pp. 25-27).

This bulletin goes into the history of the naval-stores industry and shows that the destructive method of boxing has been the one practiced since before the War of the Revolution until very recently, when the cup system has become introduced to a certain extent.

See also "Conservative Turpentining," by George P. Sudworth, of the United States Forest Service, in the report of the National Conservation Commission, 1909, Senate Document No. 676 (60th Cong., 2d sess.), volume 2, page 498. This is a discussion of the evils of the boxing system and the benefit to be derived from supplanting it by the use of cups, etc., and contains striking photographs, as well as maps indicating the extent of the naval-stores industry. From this document we excerpt the following:

Page 500:

The first method of obtaining crude resin was to cut a deep pocket or "box" in the base of the tree for the purpose of collecting the resin which flowed from cuts made in the tree's trunk just above the box. New cuts, "streaks," were made, one above another, each week in order to stimulate a fresh flow of resin, which dripped from the edge of the new cut "chip" into the box. The box held about three pins of resin, and at the end of every four weeks this was "dipped" out by means of a thin, flat, spadelike tool called a dipper. The weekly chipping proceeded from March to September, when the resin would no longer flow readily. Each tree was usually worked—"turpented"—for four or five seasons, when it was abandoned.

At the end of four or five years the aggregate chipping done to each tree was equivalent to cutting off from two to six slabs (three-fourths of an inch to 2 inches deep) from two or three sides of the tree. The breadth of these slabs was from 8 to 12 inches and from 5 to 7 feet in height. Large trees were thus often practically stripped of their outer layers of living or "sap" wood.

Moreover, the depth and width of the box were so great as to actually cut away from one-third to two-thirds of the tree's thickness at the base. The trees were thus so weakened that heavy windstorms easily threw them in large numbers. * * *

Page 501:

Of the pine forest now yielding or being worked for naval stores 87½ per cent is being worked by the ancient, destructive box system. Twenty per cent of this timber is passing the point of production, while the remaining 80 per cent is at the height of its productiveness and will cease yielding within two years. Of this producing forest 20 per cent has been more or less burned, which means that the total possible production has not only been appreciably reduced, but that as a result of burning the turpentine tree trunks the commercial quality of lumber available from this timber is also degraded. Charring the chipped or turpentine trunks produces extensive pitchy areas in approximately 8 to 10 per cent of the saw timber. The total loss from this damage is conservatively estimated at 5 per cent. It is believed to amount to from 5 to 10 per cent, for the damage involves 12 to 15 per cent of the best part of every merchantable tree.

It is estimated that 5 per cent of the forest, yielding or being worked for naval stores under the old box system of turpentine, is either dead or thrown down as a direct result of the severe cutting necessitated by this method. (See fig. 1.) This amount may be safely reckoned as total loss, since the scattered and isolated occurrence of areas so affected are not usually reached by lumbering operations before the timber is badly affected by decay and wood-boring insects.

Page 502:

Timber worked for naval stores under the old box system is more subject (1) to fire, from which may result death, or such injury of vitality that little or no product is yielded afterwards. From the severity of the box cutting large areas may be thrown by wind and be wholly lost; (2) under this system the forest is rendered unproductive of naval stores practically after the fourth year. Three to four years more of production may be added by cutting boxes on unused sides of the trunks ("back boxing"). The more enlightened operators who own their forests, and therefore value them, and expect to utilize the lumber after the first four years' use, for turpentine, refrain from "back boxing" to avoid the certainty of total or very great loss likely to follow from windstorms, which, as already shown, such over-boxed timber is too weak to withstand.

In the earlier great abundance of naval stores producing pine timber only large trees were boxed. The young pole trees were left to grow. "Worked-out" timber was then quickly abandoned for new crops of "round" timber everywhere abundant.

The enormously depleted supply of round timber of to-day results in the boxing of practically every tree the land carries, down to 4 or 5 inches in diameter. This, too, frequently includes every tree. Profitable returns can not be expected from timber less than 10 inches in diameter. No young, unimpaired trees remain to form the future forest. The controlling purpose of this shortsighted policy is to strip the land as completely as possible, because in the life of the present operator another crop of naval stores is not expected. Young trees so severely boxed can

not recover sufficiently to grow into thrifty, sound timber; they usually die. Possibility of profitable naval stores production in all sections so treated is either wiped out or will be within half a decade.



UNION NAVAL STORES COMPANY v. UNITED STATES.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 80. Submitted December 20, 1915.—Decided February 21, 1916.

A claim of the United States for spirits of turpentine and rosin taken from government lands is not fatally defective because the crude and not the manufactured property was taken from the land, or because the land was described by the general description by which it was known, there being no other lands so known.

There being evidence from which the jury could form a reasonably certain estimate of amount of crude product taken by a trespasser from government land and the probable amount of manufactured product it would produce, *held* that defendant was not entitled to a peremptory instruction in his favor, or one to limit recovery to nominal damages, because the precise quantity was not shown.

Land entered by a homesteader remains public land of the United States for five years and until patent is issued, subject to the right of the homesteader to treat the land as his own, so far, and only so far, as is necessary to carry out the purposes of the act; and such purposes do not include boxing and chipping trees for the purpose of extracting turpentine or rosin for sale and profit.

Such boxing and chipping is not cultivation; and, as government publications have pointed out, seriously affects the value of the trees.

The Act of June 4, 1906, c. 2571, 34 Stat. 208 (Crim. Code, § 51), prohibiting the boxing of trees on government land for turpentine, rendered criminal that which prior to the passage of the act was actionable; and one conducting, with full knowledge of the facts, in 1904 and 1905, turpentine operations on government land under an unperfected homestead entry was a willful trespasser, and ignorance of the law does not excuse him.

Where, as in this case, the trespass was willful, the United States is not divested of its property, but is entitled to the product manufactured by a third person who knowingly purchased the same from the trespasser.

One knowingly taking property of another cannot, by changing its form or increasing its value, or commingling it with other property of his own, acquire title by accession.

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The fact that the purchaser had a mortgage on the product, both crude and manufactured, of the trespasser, which contained an after-acquired property clause and covered a large amount of other property held not to affect the right of the United States to recover that part of the manufactured product which the jury found was derived from the crude article taken from government land.

One knowingly purchasing a manufactured article from a trespasser who converted the crude article, must account for the value as manufactured and can take no credit for the work and labor of the wrongdoer in manufacturing it.

202 Fed. Rep. 491, affirmed.

THE facts, which involve the liability of one who improperly converted turpentine and rosin from Government lands, are stated in the opinion.

Mr. Richard W. Stoutz for plaintiff in error.

Mr. Assistant Attorney General Knaebel for the United States.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was an action by the United States against the Union Naval Stores Company for the conversion during the years 1904 and 1905 of spirits of turpentine and rosin alleged to have been taken by defendant from certain Government lands in the County of Mobile, in the State of Alabama, known as the Freeland Homestead, and thus and otherwise more particularly described in the complaint.

The facts, as they appeared at the trial, were as follows: Freeland had made an application for a homestead entry under § 2289, Rev. Stat., but never perfected it. Being the owner of other lands in the same neighborhood, Freeland agreed with one Rayford to give him a turpentine lease for a lump sum upon all of his timber, not including the homestead. A third party having been employed to reduce the agreement to writing, Freeland discovered that the homestead had been included, and he called Rayford's attention to this and tendered back the

check given for the consideration money, on the ground that if the homestead was included in the lease he would be in danger of losing his entry. Rayford replied: "There is no law against turpentineing a piece of homestead land as long as you are on it." And so Freeland made no further objection.

Rayford, during the years in question, conducted turpentineing operations upon the Freeland homestead and a large number of other tracts in its vicinity. Under date December 21, 1903, he had entered into a "shipping contract" with the Union Naval Stores Company, by which he undertook to cut and box at least 10 crops of 10,500 boxes each from lands described in a deed of trust or mortgage of even date given by him to one Wade as trustee of the company, and to manufacture the crude turpentine into spirits of turpentine and rosin, and deliver the manufactured product at Mobile, Alabama, or other points selected by it. By the same agreement plaintiff in error undertook to advance moneys to be used by Rayford, and that it would receive the manufactured turpentine and rosin and sell it for Rayford's account at stipulated charges and commissions. The mortgage was given to secure the advances and the performance of the shipping agreement. It covered Rayford's turpentine leases, and also all crude and manufactured spirits of turpentine, and other products owned or in any manner secured by Rayford during the continuance of the contract. The crude turpentine taken by Rayford from the homestead was mixed with that taken from his other properties at or before it reached the still; and the manufactured products were shipped from time to time to plaintiff in error at Mobile, bills of lading being sent by mail, and accounts of sales being returned by plaintiff in error to Rayford.

It was admitted that, during the years 1904 and 1905, spirits of turpentine and rosin were received by plaintiff in error from Rayford, under the contract and mortgage re-

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ferred to, in quantities greater than those claimed for in the suit. There was evidence as to the market values of these products during the period in question, but none as to the market value of crude turpentine. A verdict and judgment having gone in favor of the United States for \$2,447.55, defendant appealed to the Circuit Court of Appeals, where it was directed that so much of this as represented interest prior to the commencement of the action should be remitted, and the judgment otherwise affirmed. 202 Fed. Rep. 491.

There are numerous assignments of error, based upon exceptions taken at the trial, one of them to the refusal to direct a verdict in favor of defendant, the others to instructions given or refused to be given. Without reciting these in detail, we will express our views upon the principal questions of law that are raised.

Neither the complaint nor the evidence is fatally defective or uncertain. The claim is for spirits of turpentine and rosin taken from certain described lands. That it was the crude and not the manufactured product that was in a literal sense taken from the land is of no consequence. The land is referred to only to identify the chattels, conversion of which is alleged. Whether there was an error in the particular description of the lands, as is insisted, is a matter of no serious consequence, for they were otherwise described as the "Louis I. Freeland Homestead," and there was uncontradicted evidence that the lands referred to, and no others, were known by this description. That the evidence did not show precisely what quantities of turpentine spirits and rosin, manufactured from the crude turpentine taken from the homestead, were received by the plaintiff in error, was not ground for a peremptory instruction to find for defendant or to limit the recovery to nominal damages, since there was evidence from which the jury could form a reasonably certain estimate of the amount of crude taken from the homestead during the

years in question, and the amount of spirits and rosin that this probably yielded.

There was no error in charging that "the boxing of trees by a settler on public land covered by an unperfected homestead entry, or by any person who knew it was public land (which an unperfected homestead entry is), and the extracting of crude turpentine therefrom, constitutes in law an intentional, willful trespass, although he may have acted without knowledge of the illegality of the act, and that from such persons the United States are entitled to recover the value of the product manufactured from such crude turpentine by the settler, or from any person into whose possession the same may have passed." This refers, of course, as other parts of the charge clearly show, to a manufacture by Rayford, who was himself the trespasser.

The rights and privileges of an entryman with reference to standing timber were considered and discussed in *Shiver v. United States*, 159 U. S. 491, 497, 498, where, after reviewing the pertinent sections of the Revised Statutes, it was said: "From this résumé of the homestead act, it is evident, first, that the land entered continues to be the property of the United States for five years following the entry, and until a patent is issued; . . . third, that meantime such settler has the right to treat the land as his own, so far, and so far only, as is necessary to carry out the purposes of the act. The object of this legislation is to preserve the right of the actual settler, but not to open the door to manifest abuses of such right. Obviously the privilege of residing on the land for five years would be ineffectual if he had not also the right to build himself a house, outbuildings, and fences, and to clear the land for cultivation. . . . It is equally clear that he is bound to act in good faith to the government, and that he has no right to pervert the law to dishonest purposes, or to make use of the land for profit or speculation. The law

contemplates the possibility of his abandoning it, but he may not in the meantime ruin its value to others, who may wish to purchase or enter it. With respect to the standing timber, his privileges are analogous to those of a tenant for life or years. . . . By analogy we think the settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuildings, and fences, and, perhaps, as indicated in the charge of the court below, to exchange such timber for lumber to be devoted to the same purposes; but not to sell the same for money, except so far as the timber may have been cut for the purpose of cultivation."

There is nothing in the letter or policy of the homestead act that permits the boxing and chipping of pine trees for the purpose of extracting turpentine for sale and profit. It cannot be regarded as cultivation within the meaning of the act; it affects the value of the inheritance too seriously for that. As is well known, the process requires the cutting of a deep gash or "box" into the side of the tree, so shaped as to catch and retain a considerable quantity of the crude gum, and repeated chippings thereafter, by each of which an additional portion of the bark is cut through to the wood so as to expose a fresh bleeding surface. It not only saps the vital strength of the tree and lessens its power to resist the force of the wind, but exposes the wood to decay and to wood-boring grubs and beetles; while the waste gum, being highly inflammable, increases the danger of forest fires. Government publications have repeatedly pointed out the ill effects of the practice.¹

The recognition of these evils led Congress to pass the

¹ "A New Method of Turpentine Orchardng," Bulletin No. 40, Bureau of Forestry, 1903, pp. 9-13; "The Naval Stores Industry," Bulletin No. 229, Department of Agriculture, July 28, 1915; "Conservative Turpentinng," Senate Doc. 676, 60th Cong., 2d Sess., Vol. 11, p. 498. See also 1 Land Dec. 607; 4 Land Dec. 1; 5 Land Dec. 389; 36 Land Dec. 302.

act of June 4, 1906, ch. 2571, 34 Stat. 208, now found in Crim. Code, § 51 (act of March 4, 1909, ch. 321, 35 Stat. 1088, 1098). It is true that in *Bryant v. United States* (1901), 105 Fed. Rep. 941, the Circuit Court of Appeals for the Fifth Circuit, in holding that boxing for turpentine was not a criminal offense within the meaning of § 246, Rev. Stat., said, *obiter*, "We think it is not a matter of common knowledge that such cutting and boxing of pine trees destroy the value of the trees as timber, or that it has a tendency even to retard the growth of the trees," and that this view was made the basis of a decision by the Circuit Court of Appeals for the Eighth Circuit that prior to the act of 1906 the boxing of trees for turpentine on public lands was not actionable. *United States v. Waters-Pierce Oil Co.*, 196 Fed. Rep. 767, 769. We are clear, however, that the act of 1906 only rendered criminal that which before was actionable because not included in any right or privilege expressly or by implication conferred upon the homesteader by the act of Congress. So the Circuit Court of Appeals for the Fifth Circuit held in *Parish v. United States*, 184 Fed. Rep. 590. And see *United States v. Taylor*, 35 Fed. Rep. 484.

Rayford, in conducting his turpentinizing operations upon the homestead with notice that the land was the property of the United States, became a willful trespasser, although he may have supposed, as he is said to have declared, that there was "no law against it." He acted with full notice of the facts, and his mistake of law cannot excuse him.

Upon the facts as the jury must have found them, the distillation by Rayford of the gum that was taken from the Government's land was a continuing act of trespass that did not divest the United States of its property but left it still entitled to the manufactured products. *The Distilled Spirits*, 11 Wall. 356, 369. If the doctrine of confusion of goods were to be applied, the entire product of the still would belong to the United States. *The*

"*Idaho*," 93 U. S. 575, 586. But by the instructions of the trial judge recovery was limited to the value of the products manufactured from crude gum taken from the Free-land Homestead.

It is ingeniously argued that a different rule must govern as between the United States and the defendant company, because the company had a mortgage upon Rayford's product, both crude and manufactured; that the crude stuff as soon as it reached the still was inextricably mixed with a much greater quantity to which Rayford had an unquestioned title which passed to defendant at once by virtue of the mortgage, and that the evidence shows such hopeless confusion and admixtures of unknown quantities and varying qualities of gum that no reasonable ascertainment of the rights of the parties as tenants in common is possible; therefore, the Government property, being relatively small in value, passed to defendant under the doctrine of accession. It is less confidently argued that the same result would apply even as between the lawful owner and a willful trespasser; but this we deem clearly untenable. One who knowingly takes the property of another cannot, by changing its form or increasing its value, or by commingling it with other property of his own, acquire title by accession. *The Distilled Spirits, supra*; *Silisbury v. McCoon*, 3 N. Y. 379; 53 Am. Dec. 307, 315, *note*.

The argument based upon the mortgage is confronted with this obstacle, to say nothing of others: that the mortgage and the shipping contract alike contemplated that Rayford should manufacture the crude turpentine into spirits and rosin and ship these to defendant, and such was the actual course of dealing thereunder. Defendant at no time asserted any lien upon or property in the crude material by virtue of the mortgage. And even if it were now permitted by a fiction to assert ownership in all that part of the crude gum which was the lawful property

of Rayford, as of the time that it reached his still, it must perforce place itself in the position of employing Rayford as its agent for the purpose of distilling the turpentine. Now Rayford, in doing this, placed with it a comparatively small, but still substantial, quantity of crude turpentine that was the property of the United States. Defendant cannot take a benefit from the distilling operations thus conducted by Rayford without at the same time assuming a responsibility for that which he did; and what he did in distilling the Government's gum was a continuing trespass, that left the United States entitled to its property in its changed form, the same if the distilling was done by Rayford under an agency from defendant, as if done on his individual account.

And of course, if defendant's title dates from the time of the delivery to it of the manufactured product, it can take no greater interest than that which Rayford held.

Thus, whether we indulge the fiction, or whether we adhere to the practical fact, which is that Rayford under the contract delivered manufactured products to defendant, the latter can take no credit for the work and labor bestowed upon the turpentine by the wrongdoer, but must answer for its value as manufactured products. *Wooden-ware Co. v. United States*, 106 U. S. 432, 435; *Guffey v. Smith*, 237 U. S. 101, 119.

The after-acquired-property clause in the mortgage does not help matters for defendant. Property in the turpentine could not be acquired by Rayford without the consent of the United States, and this he did not have. See *Holt v. Henley*, 232 U. S. 637, 640; *Detroit Steel Co. v. Sistersville Brew. Co.*, 233 U. S. 712.

It is insisted that if a tenancy in common existed in the manufactured product, the possession of it by defendant company was not tortious, and that in order to show a conversion there must be either a demand for possession and refusal thereof, or a showing that some

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disposition was made of the chattels inconsistent with and destructive of the rights of plaintiff as co-tenant. But, taking the shipping contract and the mortgage with the testimony and admissions as to the course of business carried on thereunder, the jury was fully warranted in finding that defendant had converted the manufactured products by selling them soon after they were received, and accounting to Rayford for the proceeds. The question of conversion was submitted to the jury, with a proper instruction that in such event a demand for possession was futile and therefore unnecessary.

The trial court instructed the jury that recovery should be based upon the market value of the spirits and rosin at the time they were received by defendant, and it insisted that the value at the time of the conversion ought to have been taken instead. As to this it is sufficient to say that, except as it was to be inferred that probably the manufactured products were sold not long after their receipt by defendant, there is nothing to throw light upon the time that intervened between receipt and sale; and while by stipulation the highest and lowest market prices for turpentine and for rosin during the years 1904 and 1905 were shown, it did not appear at what time the prices were high, and at what time low. In short, the evidence contained nothing to aid the jury in distinguishing between the market price at the time of receipt and the market price at the time of sale. Defendant did nothing—if it could—to elucidate the matter by evidence, nor did its exceptions call the attention of the trial judge to the point now insisted upon.

Minor points are raised, but none that seems to call for discussion.

Judgment affirmed.

MR. JUSTICE McREYNOLDS took no part in the consideration or decision of this case.